

293

IN THE HIGH COURT OF JUSTICE
OYO STATE OF NIGERIA
IN THE IBADAN JUDICIAL DIVISION
HOLDEN AT IBADAN

BEFORE HIS LORDSHIP THE HONOURABLE JUSTICE M. L. ABIMBOLA – CHIEF JUDGE
THIS TUESDAY THE 24TH DAY OF JANUARY, 2017.

SITTING AT HIGH COURT. 1
SUIT NO. I/1EFCC/14

In the matter of application by the Executive Chairman of Economic and financial Crimes Commission for an Interim Order of Attach/Forfeit the properties of the person named in the schedules herein, pursuant to Section 44(2) (K) of the Constitution of the Federal Republic of Nigeria 1999 (as amended) and Section 28 and 29 of the EFCC Act No 1 of 2004.

BETWEEN

FEDERAL REPUBLIC OF NIGERIA APPLICANT/RESPONDENT

AND

- | | | |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------------------|
| 1. MUI LI HAKEEM ADEREMI
2. FIMHAB NIGERIA LIMITED
3. IYABO GIWA
4. JUMATH INVESTMENT & SERVICES NIG. LTD
5. OGUNTAYO BAIYI N.
6. ADEBIYI MUSENDIC OLASUMBO
7. ADELEKE KUDIRAT IYABO
8. ADEDUNTAN JOHNSON
9. KAREEM RASHEED | } | RESPONDENTS/APPLICANTS |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---|------------------------|

10. STANBIC IBTC PLC ... PARTY INTERESTED/ APPLICANT/ RESPONDENT

RULING

This ruling is sequel to the various and several and panoply of applications brought by each of the Respondent /Applicants seeking for an order to set aside an earlier order of my

2938

brother Honourable Justice Esan which was made granting severally an order of interim attachment and/or forfeiture of the several applicants properties as contained in the schedules attached to the ruling pending the determination of Charge No 1/ 6EFCC/2013 in between FRN vs. Muili Hakeem Aderemi & 11 others. Pursuant to an Exparte application in Suit No: I/1EFCC/2014 dated the 5th day of February, 2014. It is important to mention that Stanbic IBTC Plc brought a joinder application as a 3rd party interested pursuant to an application dated 26th February, 2013 which was granted.

Various affidavits were filed based upon myriads of application and different facts asserted by each of the Applicants in support of their respective applications to which the original applicant also filed counter Affidavits and further affidavit to the respective supporting affidavits. At the end of exchange of processes, the respective learned counsels adopted the written addresses as last arguments on the respective applications.

Mr. Okunade learned counsel to the 1st and 2nd Respondents adopted his written address of the 1st Respondent/Applicant in respect of the motion on notice dated 1st day of April, 2014 and the Reply on law of 23rd June, 2014. The gravamen of his argument is that the properties in issue had been acquired before the offence allegedly committed, that Section 28 of the Act does not give the Applicant/Respondent the power to forfeit peoples property that has no link with the alleged offence for which they are standing trial, that the valuation report was a restatement of what Diya and Fatimehin did in 2008 and the exhibit were done during the pendency of the case and urged me to grant the application.

In respect of the 2nd Respondent, counsel adopted the address in respect of the application of 8th April 2014 and the Reply address on the further affidavit filed on 23rd June, 2014. The gravament of the argument is that the 2nd Respondent has not been invited and/or investigated and therefore urged the court to grant the application.

Counsel to the 3rd and 4th Applicants Mr. Olaniyi George adopted the address dated 5th May 2005 and urged me to grant the application. His core argument is that the 4th Applicant is not standing trial and has not being charged before the (his words) confiscation of the 4th Applicant's properties, that the charge had earlier been filed against the Defendants before the interim order was obtained and the properties were not even listed but the Respondent went ahead and listed same referring to schedule 4. Also that paragraph 6(2) of the Respondent Counter affidavit is a speculation and there was no attachment of the exhibit and that the 3rd Respondent properties were acquired in 2004. He therefore urged me to set aside the order of attachment.

Mr. Akin Ladipo, counsel to the 5th Defendant adopted his written address dated 29th October, 2014 as argument in respect of his application of 29th October, 2014 filed on the 5th November 2014. The substance of his argument is that the applicant bought the property with the wife in 2008 and the wife is not under any investigation, the applicant also is a limited liability company and owner of the property not that of the 5th and the interest of the wife is now affected. Urged me to grant the setting aside application and other prayers therein.

294r

Mr. Fadare counsel to the 6th Respondent/Applicant adopted his written address as argument on the motion of 25th February, 2014. He argued that there was misrepresentation in the ex parte application and the application is incompetent as the rights of the applicant were not considered, the condition precedent was not followed and urged me to set aside the order made pursuant to the ex parte application. He argued further that the deposition in the Respondent Counter affidavit are legal arguments and conclusion and also lack the source of information thus against the provisions of Section 115 of the evidence Act, urged me to expunge the paragraphs and to grant the application.

Chief R. A. Ogunwole (SAN) is for the 7th Respondent/Applicant the learned silk adopted the written address dated 10th July 2015 as argument on the application of 10th July, 2014 and also the response address in respect of the further affidavit of 21st July, 2015. In the main the central point canvassed in argument is that the order was a nullity and should be set aside, that the order was obtained by suppression of facts, fraudulent, misrepresentation and concealed facts by the Applicant/Respondent, learned senior counsel referred to paragraphs 28 of the EFCC Act 2004 and urged me to set aside the order; also relying on Daragba vs. FRN (2014) 12 NWLR Pt. 1422, @ 575: it is argued that there must be an attachment of the property before the order is made and thus if the condition was not followed, the court has no jurisdiction to entertain the matter and the order was a nullity and must be set aside.

There was no representation for the 8th defendant and thus no argument was proffered on his behalf.

In respect of the 9th and 10th Respondent as applicants herein Mr. Agoro the counsel for the said 9th and 10th applicants herein adopted the written address in respect of the application of 16th May, 2016 and argued essentially that the property is jointly owned by the 9th and 10th Applicants and this joint ownership was never disclosed in the ex parte application, that the 10th Respondent had not committed any offence nor either investigated nor prosecuted, that Section 44(2) of the 1999 Constitution should be guaranteed therefore by the circumstances of the facts of this case the order on the property should be set aside.

For the 11th Respondents Mr. Kelly Ogbe adopts the argument in the written address of 26th February, 2014 as argument of the motion of 30th September, 2014. He said the application is related to the properties listed in schedule 1 & 2 of the Ex parte order and also the response or reply address of 30th September, 2014. Learned counsel essentially based the reason or grounds upon the facts that there was suppression and concealment of facts including misrepresentation in obtaining the order; there was non disclosure of material fact and the order was irregularly granted; that the 2nd Respondent is not a party to the criminal charge and he is the owner of the 2nd property and he is not under investigation, the 2nd Respondent is listed in schedule 2 for simple reason that 1st Respondent is director of 2nd Respondent and referred to Section 29 of the EFCC Act arguing that a prima facie case must be established to show the property is a proceed of crime and that the 1st and 2nd Applicants are too different person relying on NIC Ltd vs. AIN Ltd (1991) 4 NWLR Pt. 183, 63. Counsel argued that the 11th applicant have a legal interest and the Respondent has an equitable interest and thus equitable

294

interest must give way in case of conflict, therefore the order is irregularly granted urged the court to grant, the application.

Mr. Latona counsel to the Applicant/Respondent in his general response to all the above arguments before specific arguments submitted that is on this issue severally raised in a Court of Appeal decision which interpreted the constitutionality of Sections 28 and 29 of the EFCC Act cited *Dangaba vs. FRN* (2014) 12 NWLR Pt. 1422 at 575, and *Felimon Ent. Nig. Ltd vs. Chairman EFCC* (2013) 1 BALR 94.

Also in the same vein by way of general argument, the learned counsel submitted that this court lacked the jurisdiction to entertain an application of this nature based upon the provision of Sections 28 and 29 of the EFCC Act as there is no provision in the EFCC Act that provides for entertaining an application of this nature relying on *Fehinmon Enterprises Nigeria Ltd* as cited in the address.

On specific argument, counsel argued that in respect of the application of the 1st Respondent there is a counter affidavit of 26/5/2014 deposed to by Ekele Ihearachor an operative of the EFCC and relied on the deposition. It is argued that the exparte application was brought pursuant to sections 44 (2) (K) of the constitution which makes provision for taking of property of a person temporarily, that the Section 28 and 29 of the EFCC Act also makes provision for such attachment relying on *Dangada* case cited supra, counsel relying on paragraph 9 of the counter affidavit submitted further that investigation is still on going and referred to all the attachments and that the EFCC has the power to investigate.

2844

In respect of the 2nd Respondent counsel adopted his written address of 26th May, 2014 and the counter affidavit together with the Exhibits, submitted that by the deposition it is alleged that the 1st Respondent is using the instrumentality of the 2nd Respondent to acquire properties well beyond his earning and he had not explained that.

On the argument that a condition precedent has not been fulfilled, it is argued that section 28 of the Act is misinterpreted and misapplied and has been interpreted in Dangabas case. it is argued that the attachment is administratively traced and the attachment is made, that it is not a court attachment.

Refer to paragraph 6 of the affidavit, that it is not necessary to come back to court for order after attachment.

In respect of the 3rd and 4th Respondents/Applicants argument counsel relied on the 16 paragraphs counter affidavit of 4th November, 2015 and the annexures and adopts the written address thereon. On whether the property was acquired in 2008 or 2010 counsel argued that by the Counter Affidavit that is what the investigation is about and to reveal; on whether the 4th Respondent has been charged or not is not the issue. He argued that they are still being investigated and that there is nexus between 3rd and 4th Respondents and that they had lifted the veil of incorporation in respect of who is behind the registered company, referred to the annexure and argued that the proprietor of Meggamed Estate sold the properties in schedule 4 of the interim order located at Block 6 Plot 4 Carlitongate Estate Akobo Ibadan those who issued the cheque for payment and it took place in 2011.

2948

On the 5th Respondent, counsel adopted his written address of 10th November, 2015 but filed on the 11th instant and relied on the affidavits and the exhibits attached. He argued that there is no misrepresentation as there is a direct admission by the 5th Respondent to the effect that the 5th Respondent is a limited owner and that proceed of the crime was used in the improvement and purchase of the property listed in schedule 5(1) and (2) as shown in Exhibits EFCC 13 and 20, that the 5th Respondent is connected to Cartongate Estate Megabournd Investment and by Section 7 of the Act they are entitled to investigate same in respect whether the properties are proceeds of crime.

On the 6th Respondent, counsel adopted his written address of 4th April filed on the 7th and relied on the counter affidavit and argued that the depositions therein it did not offend Section 115 as the deponent is an EFCC operative who started the investigation as carried out, therefore his depositions is not a prayer or an extraneous matter. It is argued also that the public interest overrides the hardship complained of by the applicant.

On the 7th Respondent learned counsel adopted the Written Address dated 11th May, 2015 relying also on the counter affidavits filed and urged the court to refuse the application. It is argued further that there is an admission of facts alleged in exhibit EFCC 13 at page 192. That the applicant admitted that some people paid money into the account and by investigation the said people are never in existence, that the money run into millions of naira and they are investigating that they are looking at money laundering and also offences of corrupt practices against and other related Corrupt practices Act, Cap C31 LFN 2004, Section 8 particularly on

29/4/16

offence relating to accepting gratification; Although the house was purchased in 2008 and we have annexed her income exhibit EFCC 14, the source of income cannot support the Ownership of such property.

On the 9th and 10th Respondents, counsel relied on the counter affidavit of 11th January, 2016 by Ahmed Gaali and the exhibits and adopted the written address of 8th January 2016 as arguments thereon.

On the 11th Respondent, counsel relied on the two affidavits filed and the exhibits thereof and adopted the written submission thereon of 4th April filed on 7th April 2014. It is argued that there is no misrepresentation and suppression of facts, that they wrote to Stanbic IBTC in respect of the 1st and 2nd Respondents pursuant to Section 38(1) of the Act that the property belongs to 1st Respondent mortgaged to Stanbic IBTC, Schedule 2 which belong, to the 2nd Respondent also mortgaged to IBTC, that the reason is that the 11th Respondent parts with a sum of N130Million in favour of the 2nd Respondent to finance his business, counsel refers to Exhibit EFCC 8, that the property is indeed funded with fraud.

Responding the learned senior counsel for the 7th Respondent argued that the issue of jurisdiction was never raised by the Respondent in their address.

I have read the whole of depositions in the affidavit counter affidavits, the further affidavits and the further further affidavits and all the legal submission in the respective addresses as filed and adopted I have only given a summary here as adumbrated upon

294

because the whole case files run into about four volumes and over 2,000 pages in the processes and several exhibits as attached.

What calls for determination before me is whether the order of interim attachment or forfeiture as given by my learned brother ought to be set aside upon the fact deposed to in the respective supporting affidavits of the herein applicants. By way of recapitulation the facts are that condition precedent was never followed before the order was sought for and obtained which makes the order, nullity, that also there are suppression, falsification and misrepresentation of facts presented before the court who gave the order. Also a claim to ownership of the property which is subject matter of the order by a party not charged.

Let me start my reasoning in the determination of this application by a restatement of the principles of legality that the exercise of governmental authority or any of its agencies directly affecting individual interest must rest on legitimate or legal foundation, Ipsofacto the power exercised by any government agency must be derived directly or indirectly from either the constitution, or a statute, so be it with the EFCC. hereinafter referred to as the commission. The commission brought the exparte application pivoted upon Section 44(2) (4) of the constitution of the FRN (as amended) and Section 28 and 29 of the EFCC Act of 2004.

Section 44(1) provide that no moveable property or 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 law (among other things); sub 2 provides that nothing insubsection 1 of this

section shall be construed as affecting any general law (by sub 2K) relating to the temporary taking of possession of property for purposes of any examination, investigation or enquiry. Section 28 of the EFCC Act 2004 provides “where a person is arrested for an offence under this Act, the commission shall immediately trace and attach all the assests and properties of the person acquired as a result of such illegal act and shall thereafter cause to be obtained an interim attachment order by the court”

Section 29 provides where (a) the assets or properties of any person arrested for an offence under this Act has been seized or

(b). Any assest or property has been seized by the commission under this Act, the commission shall cause an exparte application to be made to court for an interim order forfeiting the property concerned to the Federal Government and the court shall if satisfied that there is Prima facia evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government.

It is argued that the attachment of properties must first be made before order of interim attachment is sought and obtained in court. It then becomes relevant to define what constitute an attachment. In Blacks Law dictionary 7th edition page 123 an attachment is defined as “The seizing of a person property to secure a judgment or to be sold in satisfaction of judgment. Also it is defined in paragraph 5 simply as the act of affixing or connecting something (a document) that is affixed or connected to something. Without finding a better word or description as it relates to what attachment means within the context of Section 28 I would in my view say it is just an inchoate action of laying claims or interim seizure of a property by the commission upon claims that the property is a product or proceed of criminal related conduct , and such conduct are under investigation the commission shall identify the property, seize

same and thereafter the commission proceeds to court to obtain an interim order of attachment pending final determination of an investigation or a charge. In my view characterize 'attachment' in the superlative more than mere identification and /or annexation as a condition precedent to obtaining the order is a total misconception of the word '**attachment**'. To me attachment and obtaining an order of court by way of interim attachment are words to be read together only purposively. An order of interim order of attachment is therefore impracticable without the attachment first made which simply is identifying the property and linking same with a crime to be investigated or charged, applying the concept of condition precedent thereafter will be totally out of place within the context of the usage in section 28 of the Act. I am not so persuaded in the respective argument that a condition precedent existed which makes order of interim attachment made by a court a nullity. It is within this context that I hold that the order made by my lord Esan Judge was not a nullity. Similarly and in the same vein I am constrained to hold that the power to obtain such interim order of attachment of property under investigation is not constrained by any condition precedent. The provision of the constitution even overrides and more superior to the provisions of a statute of the commission, since the commission stated to have brought the application under Section 44(2)(K) which has no condition prior to obtaining any order of interim attachment, the order is not subject to any condition and thus make the order so obtained as regular and valid and not a nullity.

I am constrained in the same vein to say that the provision of interim attachment order is only to preserve the res of a subject matter of investigation or charge pending final resolution of the matter. At the end of the day a property established not linked with the proceeds from a

2950

crime shall be released. To me the use of the word attachment is not a magic word with any specialized procedure than identifying the property as a property built from proceeds of crime. Reading sections 28 or 29 together communally and given a precise and purposive interpretation says nothing new, see Bada JCA in Dangabas case supra.

In my view once a court gives an interim order of attachment or forfeiture it is assumed that a prima facie case has been established before the court. Any consideration for setting aside is to me a review of the order upon factual depositions now presented. This is the law and the argument on hardship of owner of such property is only based on sentiment and it is trite law that sentiment is a dangerous will O' the wisp to take as guide in search of principles, legal evidence and arguments and not sympathy fortifies a parties claim.

Also the requirement that guarantees a setting aside of an interim order is the practice relating to procedure is different and distinct from the requirement under an order granted pursuant to section 28 of the commission Act. This procedure is a quasi criminal procedure and not civil procedure. The power or jurisdiction of a court is confined and conscripted to legal rules and must be exercised within those rules.

In Dangabas case supra it is held that there is no rule provided for setting aside of orders of interim attachment. I am bound by that decision.

The next question is whether upon the facts as severally stated, the order of interim attachment ought to be set aside. The various facts were set out as the supporting affidavit of the Respondent/Applicants. There were counter affidavit filed by the Applicant/Respondent and

further affidavit and further counter affidavit. In effect the facts asserted are disputed. The principle is settled that when there are contested facts or issues in contest and which facts and/or issues becomes practically impossible to be settled one way or the other without touching issues that are meant to be determined at the final stage or judgement at an interlocutory stage, it would be improper to proceed to settle those disputed fact. In effect in settling questions as to whether a property under attachment belongs to one party or the other it is in my view very difficult not to sway into a determination of issues meant to be determined at the end of the investigation and for trial at this stage. It is therefore admittedly improper in such circumstance for me to go into settlement of those issues but rather to allow such issue which becomes issues of evidence to be settled by the trial court.

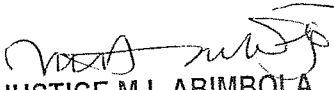
Lastly the principle is settled law of practice that when a section of the law has been given interpretation by a higher court, a court lower in heirachy has no business embarking on the exercise of interpreting such section but has a duty to look for and apply the interpretation given to that section by the higher court.

The case of Falimon Enterprises Nig. Vs. Chairman, Economic & Financial Crimes Commission delivered by the Lagos Division of the Court of Appeal in Suit No: CA/L/987/2010 on the 18th of January, 2013 is on all force with this application under consideration. Equally too this case of Dangaba v. FRN (Supra) cited by the learned senior advocate for the 7th Applicant and the counsel to the commission respondent is also on all force I shall use the decision therein to hold that there is no procedure for setting aside order obtained exparte for

0336

interim attachment under section 28 of the EFCC Act. The simple procedure is to go all hog of trial to establish non culpability as charged leading to the order and attachment of the property.

From the above reasoning I find it difficult to hold otherwise in this application but to uphold the arguments of the applicant/Respondent counsel. The totality of my reasoning is that I shall refuse to grant the respective request or prayer to set aside the order of interim order granted. The application are hereby severally refused and dismissed.


HON. JUSTICE M.L ABIMBOLA
CHIEF JUDGE
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