IN THE HIGH COURT OF ENUGU STATE OF NIGERIA
IN THE HIGH COURT OF ENUGU JUDICIAL DIVISION
HOLDEN AT ENUGU

BEFORE HIS LORDSHIP, HON. JUSTICE A. O. ONOVO – JUDGE
ON THIS THURSDAY THE 20TH DAY OF DECEMBER, 2018

CHARGE NO: **E/74C/2014**

IN THE MATTER OF APPLICATION BY THE ECONOMIC AND FINANCIAL CRIMES COMMISSION FOR AN ORDER OF FORFEITURE OF PROPERTY OF THE RESPONDENT NAMED IN THE SCHEDULE HEREIN WITHOUT CONVICTION BROUGHT PURSUANT TO SECTIONS 333, 337 – 339 OF THE ADMINISTRATION OF CRIMINAL JUSTICE ACT, SECTION 24, 26, 29 AND 34(1) OF THE ECONOMIC AND FINANCIAL CRIMES COMMISSION ESTABLISHMENT ACT, 2004, SECTION 13 OF THE MONEY LAUNDERING ACT, 2011 AND ORDER 2(2), SECTION 38(3) – (5) OF THE ICPC ACT, SECTION 17 OF THE ADVANCE FEE FRAUD AND OTHER FRAUD RELATED OFFENCES ACT NO 14, 2006, SECTION 44(2) B OF THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA.

BETWEEN:

Federal Republic of Nigeria - - - - - Complainant

AND

Hon. Justice Innocent Azubike Umezulike (OFR) - - Defendant

JUDGMENT

Information was filed on the 29th day of March, 2017 against the defendant who was the former Chief Judge of Enugu State until his retirement from service. The charge is as follows:

STATEMENT OF OFFENCE

Use of office to confer corrupt or unfair advantage contrary to section 19 of the Independent and Corrupt Practices and other Related Offences Act, Laws of the Federation, 2000.

PARTICULARS OF OFFENCE

Hon. Innocent Azubike Umezulike OFR 'M' sometime February, 2014 at Enugu within the jurisdiction of this Honourable Court whilst being the Hon. Chief Judge, High Court of Justice, Enugu, (a public officer) did use your position to confer unfair advantage upon yourself by inviting one Prince Arthur Eze, the Chief Executive Officer (CEO), Oranto Petroleum Ltd who is a litigant in pending and concluded civil matters to wit: Suit No. E/388/2010 Prince Arthur Eze versus Diamond Bank Plc and E/147/2012: *Prince Arthur Eze versus Major Concepts Ltd.* respectively presided over by you to the launch of a book titled "**ABC of Contemporary Land Law in Nigeria**" authored by you where the said Prince Arthur Eze donated #10, 000, 000.00 (Ten million naira) only by Fidelity Bank Plc Cheque drawn in the account of Oranto Petroleum Ltd which you accepted and paid the said sum of #10, 000, 000.00 (ten million naira) only into your Zenith Bank Plc account number 1001189952 and thereby committed an offence.

On 14/7/2017, the defendant pleaded: "Not Guilty" to the charge as read and was granted bail on self recognition. The case thereafter proceeded to hearing. A total of six witnesses testified on behalf of the prosecution before the death of the defendant was announced. On 12/7/2018, Wahab Shittu Esq. of counsel who appeared for the prosecution applied to withdraw the charge before the court following the announced death of the defendant. That application was not opposed consequent upon which the charge was struck out and the defendant discharged.

However, on 19/7/2018, Wahab Shittu Esq. filed two Motions on Notice: one sought an order permitting the complainant/applicant to relist the charge which was struck out on 12/7/2018 as a result of the death of the defendant/respondent

while the second Motion seeks an order of final forfeiture of the sum of ten million naira, the subject of the criminal charge in court.

The charge was relisted on 7th November, 2018 following which counsel moved the 2nd Motion for forfeiture of the sum of ten million naira. The present ruling deals with that Motion. The Motion on Notice is dated 13th July, 2018 and is brought pursuant to sections 333, 337 - 339 of the Administration of Criminal Justice Act, 2015; sections 24, 26, 29 and 34 (1) of the Economic and Financial Crimes, Commission (FFCC) Establishment Act, 2004, section 13 of the Money Laundering Act, 2011, sections 38 (3) - (5) of the Independent Corrupt Practices and Other Related Offences Commission (ICPC) Act, Section 17 of the Advance Fee Fraud and other Fraud Related Offence Act, No. 14 of 2006 and Section 44(2) (b) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). It seeks the following prayer in addition to the omnibus prayer:

> ***"A final Order of this Honourable Court forfeiting to the Federal Government of Nigeria the total sum of N10, 000,000.00 (Ten Million Naira) found by the Commission in possession of the deceased respondent in the Zenith Bank Current Account No. 1001189952 of the deceased respondent which sum is reasonably suspected to be proceeds of respondent's unlawful activities".***

The motion on notice is supported by a 12-paragraph Affidavit of Urgency, an eleven-paragraph affidavit and some exhibits. The counsel filed a written address which he equally adopted as his oral argument in support of the Motion on Notice. The grounds for the application are stated thus:

1. The Defendant was undergoing criminal trial process concerning the subject matter of this application before this Honourable Court until this Honourable Court received information through counsel to the defendant that the

defendant had passed on and therefore not in a position to participate in further proceedings in this matter.

2. That prior to the death of the Respondent, the complainant had called several witnesses and tendered incontrovertible documentary materials revealing prima facie that the sum of N10,000,000.00 (Ten Million Naira) donated by one Prince Arthur Eze acting through Oranto Petroleum Ltd. by a Fidelity Bank Plc cheque which was accepted and paid into the deceased/defendant Zenith Bank current account No. 1001189952 is reasonably suspected to be proceeds of defendant's unlawful activity.
3. That the defendant having passed on in the course of this proceedings, the complainant is entitled to commence non-conviction based asset forfeiture proceedings in respect of the N10.000,000.00 (Ten Million Naira) standing in the account of the departed which is suspected to be proceeds of defendant's unlawful activity.
4. The Court of Appeal Enugu Judicial Division had on 7th day of December, 2017 in proceedings on the subject matter of this forfeiture directed as follows:

   "*As things stand now, the parties are at liberty to make appropriate applications before the court where the substantive criminal trial is pending...*"
5. Non-Conviction based forfeiture proceedings are appropriate where forfeiture is not dependent on the finding of guilt or proof of any offence and essentially represent proceedings against property as distinct from persons and arises where forfeiture of assets which is the subject matter of a crime for which the defendant was discharged or acquitted under certain circumstances - the exact situation in this proceedings.

Some facts of this case are necessary. The defendant was a judicial Officer in Enugu State of Nigeria for 23 years. Out of this number of years, he was the Chief Judge of the state for a period of 12 years. He was author of about 10 Law books and operates Zenith Bank Account No. 1001189952 in which there was an outstanding credit of 51, 736, 650. 32. The defendant's book or latest work was "ABC of Contemporary Land Law in Nigeria" whose public presentation was made on 7th February, 2014. Monies realized from the public presentation were paid into the defendant's Zenith Bank Plc account where he also paid in royalties from his other publications. One of the monies paid into that account is a cheque for the sum of ten million naira issued from the account of Oranto Petroleum Ltd.

The prosecution is alleging that the Managing Director of Oranto Petroleum Ltd, Prince (Engr.) Arthur Eze had some cases which were either pending or concluded in the court then presided over by the defendant at the time of the book presentation and issuance of the ten million naira cheque. After investigation, the defendant was charged to court. He had been retired from service. The applicant had obtained an order for interim forfeiture of and placed 'No Debit' on the entire sum in the Zenith Bank account belonging to the defendant. The said account was thus frozen.

The interim order made by the Federal High Court was unsuccessfully challenged by the defendant. The court refused the prayer to vacate, quash or set aside the order earlier made by the Federal High Court and an appeal against that refusal to set aside the order freezing the account to the Court of Appeal equally failed. At the time of the hearing of the appeal at the Court of Appeal, Enugu the present charge was already filed and pending in this court. After taking the evidence of 6 witnesses for the prosecution, the defendant was reported sick and hospitalized. He was later flown out of the country after the Federal High Court in

Port-Harcourt which had ordered the seizure of his official passport released same to him for purpose of travelling overseas for medical treatment. The defendant never made it back to the country alive. He died overseas.

When the matter came up for hearing on 12/7/2018, there was already opened a Condolence Register in front of the Hon Chief Judge's building in the Judiciary headquarters, High Court complex, Enugu. I informed counsel that the possibility of the defendant appearing in court to answer to the charge against him was indeed rare. It was difficult.

It was at that point that counsel who was not sure whether to ask for an adjournment or to ask that the charge be struck out decided to ask for an order striking out the charge. At that point also I had to inform counsel that striking out a charge that is pending before the court remains within the powers of the court but that the prayer he can make is to withdraw the charge so that the court can exercise its power of striking out since striking out a charge can be based on a plethora of reasons given by either the prosecution or the defendant. He then withdrew the charge. As soon as the Court resumed after the annual vacation, I was informed that the prosecution filed 2 motions: one to relist the charge and another one for an order of forfeiture. Both applications were fixed for and heard on 7th November, 2018.

Incidentally, when these 2 motions were filed; the counsel to the defendant did not respond to them. There was absolute silence – grave-yard silence over the issue or matter possibly resulting from the death of the defendant but his counsel ought to have responded. There was nothing the court could do than allow the applicant take her matter the court having been informed that the defendant was served with the motion on notice. The one seeking to relist the charge was first

heard and granted. With the charge relisted, the application for forfeiture was taken and adjourned for ruling.

In order to fully understand the import of the present application, it is necessary to reproduce the averments in paragraphs 4 – 9 (k) of the affidavit in support of the application. In the aforesaid paragraphs of the affidavit, it is stated thus:

4. That I know as a fact that the defendant was undergoing criminal trial process concerning the subject matter of this application before this Honourable Court until this Honourable Court received information through counsel to the defendant that the defendant had passed on and therefore not in a position to participate in further proceedings in this matter.
5. That I know as a fact that prior to the death of the defendant, the complainant had called several witnesses and tendered incontrovertible documentary materials revealing prima facie that the sum of N10,000,000.00 (Ten Million Naira) donated by one Prince Arthur Eze acting through Oranto Petroleum Ltd by a Fidelity Bank Plc cheque which was accepted and paid into the deceased/defendant Zenith Bank current account No. 1001189952 is reasonably suspected to be proceeds of defendant's unlawful activity.
6. That I know as a fact that the defendant having passed on in the course of this proceedings, the complainant is entitled to commence non-conviction based asset forfeiture proceedings in respect of the **N10,000,000.00 (Ten Million Naira)** standing in the account of the departed defendant which is suspected to be proceeds of defendant's unlawful activity.
7. That I know as a fact that the Court of Appeal Enugu Judicial Division had on 7th day of December, 2017 in proceedings on the subject matter of this

forfeiture, directed parties to make appropriate application before this Honourable Court where the criminal trial is pending.

8. That I know as a fact that non-conviction based forfeiture proceedings are appropriate where forfeiture is not dependent on the finding of guilt or proof of any offence.

9. That I know as a fact that the sequence of events leading to this proceedings are as follows:

a. That following the receipt of the complaint, the Economic and Financial Crimes Commission commenced investigation into the matter by inviting the deceased defendant who honoured the Commission's invitation and was immediately released on administrative bail.

b. That preliminary investigation revealed that the deceased defendant launched a book titled ABC of Contemporary Land Law in Nigeria on the 7th day of February, 2014.

c. That investigation also revealed that the deceased defendant invited people for the said launching among which are some litigants in his court as a sitting Judge.

d. That several millions of naira were donated by the invited guests and the said money was deposited into the deceased defendant's account Number 1001189952 domiciled in Zenith Bank Plc., Enugu. Attached here and marked Exhibit "A" is a copy of the deceased defendant's statement of account.

e. That investigation also revealed that the deceased defendant collected Ten Million Naira from one ORANTO PETROLEUM LIMITED through one

Prince Arthur Eze towards the launching of the book at the time Oranto Petroleum Limited was a litigant in several cases before the deceased defendant.

f. That upon being given a cheque of Ten Million (10,000,000.00) by ORANTO PETROLEUM LIMITED, the deceased defendant by himself deposited the said money along with another N250, 000 (Two Hundred and Fifty Thousand Naira) in his current account number 1001189952 domiciled in Zenith Bank Plc. Enugu. A copy of the cheque and deposit slip used by the deceased defendant in paying the said money into his account are hereby attached and marked Exhibit "B".

g. That evidence led in the proceedings and exhibits tendered reveal that the Ten Million (10,000,000.00) deposited into the deceased defendant's account Number 1001189952 domiciled in Zenith Bank Plc. Enugu represents proceeds reasonably suspected (to) be proceeds of unlawful activity and liable to forfeiture to the state.

h. That monies deposited into suspect's Zenith Bank account number 1001189952 are proceeds of gratification and bribe received by the deceased defendant from Oranto Petroleum Ltd, a litigant before the deceased defendant.

i. That the defendant has since passed on.

j. That based on the evidence led in the proceedings and damning documentary evidence tendered against the deceased defendant, the amount of N10,000,000.00 is reasonably suspected to be proceeds of unlawful activity.

I have had to reproduce the above paragraphs of the affidavit to properly put in view the case of the prosecution in the present case. It is also pertinent to observe that the Federal High Court, Enugu Division had by an order made on the 23rd day of February, 2017 directed as follows:

1. That an order is granted that the Bank account of the persons referred to as the account holder and/or on the bank account set out in the schedule herein be temporarily frozen, seized and forfeited in the interim to the Federal Government of Nigeria pending the conclusion of the investigation and prosecution of the said person in connection with his involvement in abuse of office and receiving gratification.

2. That AN ORDER OF COURT IS GRANTED DIRECTING The Managers, Agents, Privies of Zenith Bank Plc, to provide every necessary information on Account Names: Innocent Umezulike.

3. That the accounts are hereby frozen for the period of 60 days pending which the matter shall be charge to Court and except the order is renewed by the Court, it shall automatically lapse.

The ultimate aim of the complainant who filed the charge against the defendant was to get the defendant convicted of the offence charged. If the offence had been successfully proved and the defendant convicted, I am quite sure that at that point the complainant would have asked for the trial forfeiture of the sum of ten million naira the subject matter of this charge in a conviction based forfeiture. Death has however made that impossible. The implication of the death of the defendant is that he is no longer a person who can stand trial. The complainant

therefore decided to pursue a Non-conviction based forfeiture of the sum of ten million naira.

The counsel Wahab Shittu Esq. in the written address filed with the Motion raised a single issue for determination that is: whether having regard to the fact of this case, the applicant is not entitled to the relief being sought.

Counsel stated the situations that can lead to the commencement of Non-conviction based forfeiture to be:

1. The defendant/accused has fled jurisdiction and could not be located:
2. That defendant/accused, being a public officer or politically exposed person, acquired wealth that could not be explained/justified based on his filed asset declaration form or as legitimate earnings/income. This could be a matter before the Code of Conduct Tribunal or an issue for non-conviction based proceedings before the High Court.
3. Criminal conviction against the defendant/accused failed or could not be proved for insufficiency of evidence but the defendant/accused acquired movable and non-movable, assets including cash, which could not be justified as per (18) above;
4. The ownership of the identified suspected/illicit assets could not be ascertained after or the asset is abandoned or disowned.
5. The defendant/accused has passed away, leaving behind assets associated with Crime
6. The defendant/accused is using pseudonym from or intermediary.
7. Orders for forfeiture of property must be proportionate.

There are 3 situations under which the court can make an order for forfeiture of assets. The first is interim forfeiture of assets which can be made ex-parte once

the chairman of EFCC or any of its officers suspects that any property is the proceeds of crime or an unlawful activity they can then apply to the court. This order can be made without any charge pending in court. In other words, it can be made while investigation into the alleged crime or unlawful activity is going on. The second situation is conviction based forfeiture of property which is only made upon the conclusion of the trial of the defendant who has been found guilty of the alleged offence by the court. The third situation is known as Non-conviction based forfeiture which is made despite the fact that the defendant may have been charged to court for an offence but was not convicted by the court possibly due to lack of evidence or non-availability of prosecution witnesses. It is this third situation that presents the major problem as it is regarded as an infringement of the right of the defendant to own property and not be unfairly deprived of such property except in situations allowed by law.

Now section 43 of the Constitution provides as follows:

Subject to the provisions of this Constitution, every citizen of Nigeria shall have the right to acquire and own immovable property anywhere in Nigeria.

Section 44 provides:

(1) No moveable property or interest in an immoveable 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 –

(a) requires the prompt payment of compensation thereof;

(b) 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.

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

(a) for the imposition or enforcement of any tax, rate or duty;

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

(c) relating to leases, tenancies, mortgages, bills of sale or any other rights or obligations arising out of contracts; etc.

Section 36(5) of the Constitution:
"Every Person who is charged with a criminal offence shall be presumed innocent until he is proved guilty: provided that nothing in this section shall invalidate any law by reason only that the law imposes upon any such person the burden of proving particular facts".

The pertinent question would therefore be: if the law presumes the defendant who was charged before the court to be innocent until his guilt is proved, would it therefore be proper to accede to the request of the applicant to order the forfeiture of the sum of ten million naira found in the defendant's account when in fact he was not convicted? In other words will it conduce to justice to order the forfeiture of the sum of ten million naira contained in a cheque given to the defendant by Prince Arthur Eze through a cheque drawn on an account belonging to Oranto Petroleum Ltd because it is alleged that the said Arthur Eze had cases pending in court before the defendant when the defendant is yet to give evidence in his defence? Presently, the defendant is incapable of giving evidence in his defence.

He can no longer defend the suit or give evidence of the facts and circumstances under which the cheque issued by Prince Arthur Eze was issued. The answer to the above is not a matter of opinion or conjecture. It depends on the state of the law.

In sections 34(1) and 29 of the EFCC Act, there are 2 sets of persons who needs to be satisfied before an order for forfeiture of assets is made. The first is the EFCC while the second is the court. The section, that is, section 34 (1) provides:

> 34(1) Notwithstanding anything contained in any other enactment or law, the Chairman of the Commission or any officer authorized by him may, if satisfied that t eh money in the account of a person is made through the commission of an offence under this Act and or any of the enactments specified under section 7(2) (a)-(f) of this Act, apply to the Court ex-parte for power to issue an order as specified in Form B of the Schedule to this Act, addressed to the manager of the bank or any person in control of the financial institution or designed non-financial institution where the account is or believed by him to be or the head office of the bank, other financial institution or designated non-financial institution to freeze the account.

Once the Chairman of the EFCC or any officer authorized by him is satisfied that the money in the account of a person is made through the commission of an offence or in the Act or any enactment as stipulated in section 7 (2) (a – (f), he can bring an application for forfeiture. It is for the court before granting the order to be convinced that the EFCC has established a *prima facie* case that the asset or property concerned is liable to forfeiture.

In addition to the above provisions of the EFCC Act, there are also the provisions of the Administration of Criminal Justice (ACJ) Act, 2015 which provide for seizure of assets. These are contained in sections 333, 337 to 339.

As can be seen from these sections of the Administration of Criminal Justice Act, they authorize the courts to order seizure of instruments, materials or things believed to be used or intended to be used for criminal activities. On whether the material or thing the subject of inquiry is believed to be used or intended for a criminal activity, that is a decision the court would have to make depending on the facts and circumstances made available by the prosecution.

The defendant is charged herein with the use of office to confer corrupt or unfair advantage contrary to section 19 of the Independent Corrupt Practices and Other Related Offences Act. Counsel to the applicant referred the court to sections 47 and 48 of the Independent Corrupt Practices and Other Related Offences Act which permit the court to make an order for forfeiture of property where a defendant has been convicted for the offence charged, has been acquitted of a criminal offence or was not charged to court at all.

It is clear from the above analysis of the provisions of the Law that non-conviction based forfeiture is allowed by the law in such circumstances as are present in the instant case and the application by the prosecution, despite the fact that the defendant was not convicted or is dead, is within the powers of the prosecution to make. Having applied for an order of forfeiture in this circumstance where the defendant is dead, it is left for the court and parties to closely look at the position of the law.

I have not been shown any authority where a prosecution has proceeded upon the death of the defendant. I am quite sure the prosecution is not pursing further prosecution that will end in a conviction. The prosecution acknowledges the fact of the death of the defendant. They are no longer going after him as a

person with a view to getting him convicted. No. They are moving against the sum of Ten million naira in the bank. The prosecution had, immediately after the heading of the application titled it "*Action In Rem*" as a contrast to what the Defence perceived it to be: "*Action In Personam*".

It is agreed that *action in personam* would terminate at the death of a party to the proceedings be it the plaintiff or defendant. *Action in rem* is quiet different – it lives after the parties that instituted it. After this application was moved and adjourned for ruling, the counsel to the defendant filed an application by motion on notice seeking to set aside the order of court relisting the suit based on some grounds.

By a motion on notice dated the 23rd day of November, 2018 filed by Prof Agu Gab Agu of Gab Agu & Co. whose address is 39 Zik Avenue, Uwani Enugu the application is seeking the following reliefs on behalf of the defendant/applicant:

1. An order of court setting aside the relisting of E/74c/2014 – *FRN v. Hon Justice A. Umezulike* having been struck out the cause list on 12/7/2018.
2. A declaration of court that any application, action or step founded on the relisted charge is an abuse of court process.
3. Any other order(s) that the court may deem necessary to grant in the interest of justice, equity and in this circumstance.

The grounds for the application are stated as follows:

1. That the defendant had died to the knowledge of the applicant and the court.
2. That the death of the defendant was announced to the court by the Counsel for the defendant.

3. That the striking out of the charge was at the instance of the complainant.
4. That the complainant acknowledged the fact of death of the defendant in subsequent affidavits.
5. That upon the death of an accused person during his trial or appeal, the proceedings terminate. This is summed up in the Latin maxim "*actio personlis moritur cum personae*"[2] – a right of action dies with the person.
6. There was no service on the defendant before reenlistment and according to law.
7. The motion for reenlistment is in the form of an originating process.
8. There was no court order for substituted service.

The said application is supported by a 26-paragraph affidavit deposed to by Gabriel Oforma Agbo, an Attorney at Law, Principal Partner in Gab Oforma Agbo & Co of #151 Agbani Road, Awkunanaw Enugu and former counsel to the Defendant. There are also 2 Exhibits – the proceedings of the court on 12/7/2018 when the Charge was struck out and the Certificate of death of the defendant issued on 13/6/2018 and indicating that defendant died on 11/6/2018.

In the written address, counsel to the defendant raised 3 Issues for determination:

1. Whether a dead person can sustain a charge in personam.
2. Whether a party to a consent judgment can unilaterally renege on the terms of such judgment.
3. Whether the order for relisting obtained without notice to parties and based on suppression of material facts can be sustained.

When this matter came up for ruling on 28/11/2018 and with this motion on notice filed on 27/11/2018, I had to adjourn the ruling further in order to take the

motion at such a time when the prosecution must have filed a response to it despite the opposition put up by the prosecution that it was an application to arrest the judgment of court which has severally been held to be an abuse of court process.

In the case of *United Bank for Africa Plc v. Option One Agritrade Nig. Ltd & Anor* (2017) 11 CAR 180 where the Court of Appeal, Sokoto Division dealt with arrest of judgment (which I take the liberty to quote *in extenso*), the Court of Appeal, per Mukhtar JCA held at pp. 184 – 185 as follows:

> "The application brought on the eve of the judgment in the matter seeking for extension of time to file brief is simply described in the legal parlance as "arrest of judgment". It is a case where the 1st respondent/applicant wasted all the time for filing of briefs in a deep slumber and only wake up upon judgment notice to seek extension of time to file brief and still half-awake by exhibiting the 2nd respondent's brief attached to the supporting affidavit on the one hand and filing separately the 1st respondent's brief. This motion filed to arrest the judgment of court is tantamount to abusing the process of the court. I say without hesitation that the law is certainly not in its favour. The law is very much against the applicant seeking to arrest judgment and to reserve the proceedings by reopening the appeal for rehearing. I do not want to say that the 1st respondent/applicant is a victim of bad advocacy. The depositions in the supporting affidavit are mere flimsy excuses and cannot derail the court to arrest the impending judgment and reopen the appeal to extend time for a timed-out process occasioned by utter lack of serious prosecution by the applicant. The application to arrest the judgment of the court is simply a gimmick designed to forestall the delivery of the judgment to await the applicant for as long as he wishes. This is a clear abuse of the court's process, which no court worth its salt will ever allow. See the case

of *Newswatch Communications Ltd. v. Alh. Ibrahim Aliyu Atta (2006) 4 S.C (Pt. II) 114* where the Supreme Court held thus:

> "The procedure for arrest of judgment is now hardly known in our civil jurisprudential system. It is the act of staying a judgment, or refusing to render judgment in an action at law in criminal cases after verdict. It is usually for some intrinsic matter appearing on the face of the record, which would render the judgment if given erroneous or reversible. Under the old common law the procedure for arrest of judgment is not peculiar to the criminal cases alone it was available in civil cases under the old common law rules, but the procedure is alien to the rules of court and does not apply in civil matters." *Per Oguntade, J.S.C. (Pp. 36-37, Paras. F-A)*

It was similarly held in *Shettima v. Goni (2011) LPELR-417 (SC)* thus:
"...Generally speaking and by the decision of this court in *Newswatch Communications Ltd. v. Attah* (supra) the rules of court have no provision for arrest of judgments about to be delivered by a court."
The present motion having been filed must be heard and determined on its merits following the Supreme Court decision in the case of *Nwankudu v. Enock Ifezuo Ibeto (2010) LPELR – 4391 (CA)* where it was held thus:
"...a court must hear a motion or process before it however unmeritorious. In *Newswatch Communications Ltd. v. Attah (supra) at page 168 of the NWLR*, the Supreme Court held that any motion filed before delivery of a judgment must be heard and determined by the court before the judgment is delivered. In *Newswatch Communications Ltd. v. Attah (supra),* the trial court incorporated his decision in respect of the motion to arrest the judgment in the main judgment itself. The Supreme Court held that it was proper so long as he considered the motion and took a decision on it before delivery of the judgment. See also *Mrs. Evangeline Fombo v. Rivers State Housing & Property Development Authority & Anor. (2005) 5 SCNJ 213."* Per Ogunwumiju, JCA, (P.26, paras. B-E)"

I will say that the condition here is quite different. The application seeking to relist was filed and fixed for hearing. It was heard on the day it was fixed

without a further adjournment and ruling was delivered same day. The other application for forfeiture was heard on the same day that the matter was relisted and adjourned for 2 weeks for ruling. In any case, this case presents a peculiar situation as the issues of law it raises are not what is seen in the courts on daily basis. The motion having been filed in court, has to be heard.

By the next adjourned date, the prosecution had filed a counter affidavit to the motion. On 12/12/2018, Onyechi Ikpeazu SAN moved the motion and addressed the court. I.C. Eze Esq. of counsel who appeared for the prosecution holding the brief of Wahab Shittu Esq. and who vehemently opposed the application relied on the 9-paragraph affidavit and adopted the prosecution's written address dated 4th December, 2018 and further urged the court to dismiss the application since service was effected on the counsel to the defendant upon the death of the defendant and the application made by the prosecution is within the powers of the court to grant.

There are some salient points we need to note which will greatly assist in the resolution of the issues that have been thrown up in this case. Before going into those salient issues, there is need to summarize what has so far been the journey of this case though in very succinct terms. The story so far is as follows:

1. Charge No E/74c/2014 was instituted against Hon. Justice Innocent Azubike Umezulike (OFR) (retired), the former Chief Judge of Enugu State following the launch of his Book and based on the allegation that the sum of ten million naira paid by cheque and deposited into his personal account amounted to use of his office to confer corrupt or unfair advantage.

2. In the course of the trial and after six prosecution witnesses had testified, the defendant took ill and later on the 11th day of June, 2018, died at a London hospital where he had been taken for treatment.

3. Following the death of the defendant, the case was, on the application of the prosecution, struck out on 13/7/2018.

4. The prosecutor later realized that there was need to make permanent the forfeiture order earlier made by the Federal High Court. They therefore sought an order to relist the Charge. That they successfully did and moved the application seeking to make permanent the order for forfeiture of the sum of ten million naira.

5. The defence is now applying to set aside the order relisting the suit.

The above is a summary of the history of the case so far. Now the salient points that need to be emphasized:

1. An order striking out a case at any point does not finally dispose of the case. An order striking a case is not a judgment. A lot of argument was raised by the defence counsel who has referred to it as consent judgment.

2. A matter struck out can be brought back on the list on the application of one of the parties and on the service of the opposing party.

3. When a matter is struck out, in order to relist it, the other party must have to be served with the application. An application to relist a suit struck out is served like an originating process. It has to be served on the litigant personally or by substituted means when ordered by the court before which the application is brought.

4. Criminal prosecution most of time if successful would end with the conviction of the defendant who may have to be sent to serve a term in prison or be given an option of fine. The death of a defendant in a criminal prosecution automatically brings the prosecution of that particular defendant to an end since there would no longer be a person who would be made to serve the prison term to be passed by the court.

5. During the pendency of a suit, charge or matter in court, interlocutory applications are allowed to be made. There are certain applications that are allowed even at the end of the case after final judgment must have been delivered.

6. Cases filed in the court are give numbers depending on their nature as the Rules of court may permit. A criminal case has a numbering different from civil cases and other miscellaneous applications.

7. A living person cannot take the place of a dead person who is alleged to have committed a criminal offence. In other words, where a person who is standing trial for a criminal offence dies, he cannot be substituted with a living person. The case where he is being tried dies with him. It is only in very exceptional cases, like appeal, that some members of his family can step in to pursue some rights which might have accrued to them by virtue of the defendant's death.

8. Members of the family of the defendant can step into his shoes – not for purposes of trial – but for purposes of pursuing their own rights.

I will refer to 2 cases decided by higher court which decisions are binding on this court. The first is the case of *In Re: Abdullahi* (2018) 14 NWLR (pt. 1639) 272 at page 289 paragraph D, Augie JSC had stated: "Yes, with regard to criminal

cases, prosecution ceases with the death of an accused, which goes without saying, since no sentence can be passed on the accused, who is already dead"

And at page 292 paras G – H:

"The deceased appellant died after filing the appeal against the decision of the Court of Appeal in this Court. Yes, the appeal died with the deceased appellant, but his estate survived him, and being administrators of the deceased appellant's estate, the applicants have an interest in his estate that lives on, and which cannot be left hanging."

In the case of *Bajehson v. Otiko* (2018) 14 NWLR (pt 1638) 138 at page 152, Rhodes-Vivour, JSC stated the law thus:

"The law is well settled that a non-existent or dead person cannot sue or be sued. Only proper persons, either natural or legal, can sue or defend an action. See Anyebe v. state *(1986) 1 SC p.87 (1986) 1 NWLR (pt. 14) 39; Nigerian Nurses Association v. A-G Federation (1981) 11-12 SC p. 1.*
By the clear provisions of section 3 (supra) which states that:
'The administrative and bureaucratic structure established and referred to as the Ministry of the Federal Capital Territory is abolished with effect from 31 December, 2004'
The 2nd respondent is not only dead but properly buried. He cannot be a party in an action in court."

In the words of M.D. Muhammad JSC in the case of *Bajehson v. Otiko* (supra):

"It must be stressed that the 2nd respondent is not a nominal party in the action that brought about the instant appeal. It is a necessary party without which the dispute between the parties cannot be effectually and completely resolved. It is settled that it is only when proper parties are before the court that the court is competent to adjudicate in the suit and where the proper parties are not before the court, the court is not competent to proceed. See Justice F.O. Ayoola v. Alh. B.A. Baruwa & Ors (1999) 11 NWLR (pt. 628) 595; Okonta v. Philips (2010) 18 NWLR (pt. 1225) 320 and Kayode Bakare & Ors v. Chief Ezekiel Ajose-Adeogun & Ors (2014) LPELR – 2201 (SC); (2014) 6 NWLR (pt. 1403) 320....

With the dissolution of the 2nd respondent prior to the commencement of the appeal at the lower court, it was impossible for it to be served the necessary processes and/or even brief a counsel to represent it in court. The law is settled that a dead person, human or unnatural, can neither issue a writ nor be served one it is no longer a person in the eyes of the law. The party's personality has been extinguished by death. See Nzom & Anor v. Jinadu (1987) 1 NWLR (pt. 51) 533; (1987) LPELR – 2143 SC"

It is as clear as crystal that the defendant in this case, Hon. Justice Innocent Azubike Umezulike (OFR) who had been standing trial in this court is dead. His body has been interred. He can no longer stand trial. But I think the parties are in agreement on this point. Both agree he can no longer appear to stand trial. In fact, if per adventure, when this case was called up any semblance of his person had stood up or appeared in court that would have created some commotion.

I observe that the application to relist the suit was served on the counsel who had appeared to represent him before his death. One wonders on whose instruction he would appear henceforth. The law is, to the best of my knowledge, that this case as presently constituted cannot be used to effectuate the forfeiture of the assets of the defendant who is dead. Those assets that were formerly his has ceased to be his. A dead man cannot have assets. He cannot be made to forfeit assets which no longer belong to him. However, the administrators of his estate or his personal representatives, as the case may be, to whom the interest in those properties inure can be made to forfeit them if they are held to be proceeds of crime. The personal representatives and administrators of the estate are however not parties to this case and therefore not before the court.

It will be against the provisions of sections 36 (1) and 44 of the Constitution (which in effect guarantees the right to fair hearing and to own property anywhere in the country) to make an order of forfeiture of the assets without at least their

being part of the case where the matter is heard or being served with processes relating to it or appearing in court to defend the property. The order sought is an order for final forfeiture of asset.

I have gone through the application urging me to set aside the order relisting the charge on the cause list. I have also listened to the admonition of the prosecuting counsel that taking the application seeking to set aside the order earlier made by the court relisting the suit when the application for final forfeiture has been taken and adjourned for ruling is akin to an arrest of the judgment of court.

In the first place, the court that made an order has the power to set it aside if the court is convinced, on an application that it ought not to have been made in the first place because the process seeking an order relisting the charge was not served as required by law. The motion to relist was not served as required by law in the present case. Whether the order relisting the suit was properly made or not, the application for forfeiture as presently constituted cannot succeed as granting it will amount to a gross violation of the rights of those entitled to it.

The defendant had been a High Court Judge and the Chief Judge of Enugu State. In so far as he is not entitled to any special treatment by virtue of those positions he has held, he would equally not be subjected to any prejudice or disadvantage by virtue of those positions earlier held. The law is no respecter of persons and accords to every man his due.

I will however not dismiss the application for forfeiture which was filed in this charge since the proper parties are not before the court and for the fact that the defendant is yet to react to it. Rather, I will strike it out. It is hereby struck out. The order made by this court on the 7th day of November, 2018 relisting the case which

died with and at the death of the defendant is also set aside for non-service of the process on the relevant parties. The defendant remains discharged.

A. O. ONOVO
(Judge)
20/12/2018

REPRESENTATION:
I.C. Eze Esq., appears for the Complainant.

Onyechi Ikpeazu Esq. SAN appears with Chizoba Ijeoma Esq., for the defendant.