IN THE COURT OF APPEAL
KADUNA JUDICIAL DIVISION
HOLDEN AT KADUNA
ON FRIDAY THE 1ST DAY OF MARCH, 2019

BEFORE THEIR LORDSHIPS

OBIETONBARA O. DANIEL-KALIO	**JUSTICE, COURT OF APPEAL**
OLUDOTUN A. ADEFOPE-OKOJIE	**JUSTICE, COURT OF APPEAL**
JAMES GAMBO ABUNDAGA	**JUSTICE, COURT OF APPEAL**

CA/K/559/2018

BETWEEN

NATHANIEL KAAINJO ---- ---- ---- --- APPELLANT

AND

FEDERAL REPUBLIC OF NIGERIA ---- RESPONDENT

JUDGMENT

(DELIVERED BY OBIETONBARA O. DANIEL-KALIO, JCA)

On 29/2/16, the Appellant who was the applicant/Respondent at the High Court of Kano State (the lower Court) filed a motion dated 26/2/16. In the said motion, he prayed the lower Court for the following orders:-

> ***"1. An order of this honourable Court vacating the interim forfeiture order granted against the properties of the***

accused person dated the 6th day of January, 2016.

2. ***An order of this honourable Court releasing to the accused person his properties with the complaint/Respondent [in respect of which] an interim forfeiture order was granted dated 6th day of January, 2016.***

3. ***An order of this honourable Court allowing the accused person, his privies, agents, heirs, successors in title or anybody acting on his instruction to use, move, interfere, tamper, [with] transfer or take any action in respect of the properties [in which the] interim forfeiture order was made on the 6th day of January, 2016.***

4. ***An order of this honourable Court releasing to the accused person his items (i.e. Apple laptop, international passport, power pack of the apple***

laptop and flash drive) that is with the complaint/Respondent which are not the proceed of the alleged offence against the accused person.

5. ***An order or other orders as this Court may deem fit to make in the circumstances of this case.***

The affidavit in support of the motion stated that the Appellant was invited by the Respondent in 2014 and thereafter detained for over a week based on a complaint by a body known as Education Sector Support Programme Nigeria (ESSPIN) a Non-Governmental Organization (NGO) alleging mismanagement of funds by the Appellant. The said NGO was a former employer of the Appellant. According to the affidavit in support of the motion, after the arrest and detention of the Appellant, the Respondent went to the Appellant's house in Lagos and took away some title documents of some of his properties as well as some other valuable items. The appellant was charged to court and the respondent secured an interim forfeiture order of some of the Appellant's properties. The Appellant averred in the affidavit that the properties attached by the interim forfeiture order were not proceeds of any of the offences for which he was charged to Court.

In a counter-affidavit to the Appellant's affidavit in support of the motion, the Respondent averred that the Appellant was charged with the offence of obtaining money falsely from a United kingdom Non-Governmental Organization (NGO) known as Mott MacDonald (Nigeria) as well as another body known as Educational Support Sector Programme whilst he was the Finance Officer and signatory to the account of the NGO. It was further averred in the counter-affidavit that the Appellant used the money falsely obtained from the NGO to purchase and develop landed properties across Nigeria and in his home town of Makurdi in Benue State between 2012 and 2014. It was also averred that the Appellant admitted his financial malpractices in extra-judicial Statements made by him. The Appellant swiftly countered the counter-affidavit by filing a further affidavit. In it, he averred that paragraphs 10 – 28 of the counter-affidavit were false. He also averred that before his employment at the NGO, he worked in various organizations and was able to acquire the properties that were forfeited by the interim order of forfeiture. The said properties he further averred, were not proceeds of crime. After considering the Appellant's affidavit in support of his motion, the counter-affidavit of the Respondent and the further affidavit of the Appellant, as well as the submissions of learned Counsel, **Faruk Lawan J** in a Ruling

delivered on 22/11/16 refused the application of the Appellant having found that it lacked merit.

Dissatisfied with the Ruling, the Appellant on 19/10/18 filed a Notice of Appeal pursuant to the leave of Court granted on 15/10/18. In it, he challenged the Ruling of the trial Judge on five grounds. The Appellant's Brief of Argument was filed on 6/11/18. It was settled by **S.O. IDIKWU ESQ.** In the said Brief, the Appellant distilled the following four issues for determination, viz:-

1. ***Whether in the circumstances of the interim order of 6th January, 2016, the trial Court was right in refusing to grant the Appellant's application;***

2. ***Whether the trial judge properly considered the evidence in this case when he held that the Appellant's application lacked merit and consequently dismissed same;***

3. ***Whether the trial Court was right in holding that the continued existence of the interim order is not in violation of the Appellant's right; and***

4. ***Whether the trial judge was right in his decision that the depositions in paragraphs 4, 6, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22 and 24 of the Respondent's counter-affidavit are not offensive to the provisions of the Evidence Act".***

The Respondent's Brief of Argument was settled by **M.M. GAMBO ESQ.** It was filed on 22/11/18. The Respondent did not distill any issues for determination, preferring instead to argue the issues formulated by the Appellant. In arguing the issues, the Appellant's learned Counsel argued issues 2 and 4 together.

On issues 2 and 4, the Appellant's learned Counsel submitted that the affidavit in support of the motion to vacate the interim order of forfeiture showed that the Appellant acquired the properties affected by the interim forfeiture order between 2006 and 2014. It was contended that the charge against the Appellant showed the material time that the offences were allegedly committed by the Appellant to be between February 2014 and June 2014. It was submitted that the intention of Sections 28 and 29 of the Economic and Financial Crimes Commission Act, 2006, is that properties to be

forfeited by an interim order of forfeiture must be those derived or obtained directly as a result of an offence under the Act. Learned Counsel contended that from the evidence before the lower Court, the Appellant's acquisition of the properties attached by the interim order of forfeiture pre-dated the time he was an employee of the NGO. It was submitted that the lower Court did not properly assess the evidence before it before it dismissed the Appellant's motion to vacate the interim order of forfeiture. We were urged to remedy the injustice thereby caused the Appellant by allowing this appeal. Learned Counsel cited the case of **FELIMON ENTERPRISES LTD V. THE CHAIRMAN ECONOMIC AND FINANCIAL CRIMES COMMISSION (2018) ALL FWLR PART 929 p. 205 at 219 to 220** to show that an interim order of forfeiture obtained ex-parte can be set aside. Learned Counsel referred to the depositions in paragraphs 4, 6, 10, 11, 12, 15, 16 – 24 of the counter-affidavit and submitted that the lower Court ought to have struck out those paragraphs for offending the provisions of Section 115 of the Evidence Act, 2011.

In his argument in response, the Respondent's learned Counsel submitted that the lower Court properly considered the affidavit evidence before it before it arrived at its decision that the Appellant's application lacked merit. The lower Court it was further submitted, was also right when it held that paragraphs

4, 6, 10, 11 12, 15 and 16 – 24 of the Respondent's counter-affidavit did not offend Section 115 of the Evidence Act.

Now, while it is true that the Economic and Financial Crimes Commission Act does not provide for the discharge and setting aside of an interim order of attachment, that is no reason for a Court of law to hold that an interim order of attachment cannot be set aside in a deserving case. The long standing position of the common law which has its roots in Roman law finds expression in the maxim **ubi jus ibi remedium,** meaning, for every wrong, the law provides a remedy. Therefore, if a Court makes an interim order of forfeiture which is patently and palpably wrong, the party at the receiving end of the wrong order cannot go without a remedy. The Court that made the order cannot also feel itself to be shackled and helpless. It cannot just throw its arms in the air and let the wrong remain. It must rise to the occasion and do justice in the matter. The maxim **ubi jus ibi remedium** must have been at the back of the mind of the Supreme Court when it stated in the case of **FELIMON ENTERPRISES LTD V. THE CHAIRMAN ECONOMIC AND FINANCIAL CRIMES COMMISSION (2018) ALL FWLR PART 929** that the fact the Economic and Financial Crimes Commission Act has no provision for the setting aside of interim orders of attachment cannot be taken as a blanket

principle that once the attachment or seizure has been made, it becomes irrevocable. That said, the lower Court did not state that it cannot set aside the interim order and then leave the matter at that. It proceeded to consider the evidence before it before arriving at its decision.

After looking at the affidavit evidence before the lower Court, i am of the firm view that the lower Court arrived at the right decision when it refused to vacate the interim order of forfeiture. In paragraph 15 of the affidavit in support of his application to set aside the interim order of forfeiture, the Appellant averred that he acquired all the properties attached by the interim forfeiture order before 2012. The Respondent in paragraph 9 of its counter-affidavit averred that the Appellant was employed by the NGO sometime in 2008, that he was confirmed in 2009, and that he served the NGO till 2014. This averment puts the Appellant's acquisition of the properties within the time frame of his employment at the NGO. To escape the obvious implication of paragraph 9 of the Respondent's counter-affidavit, it behooved the Appellant to respond to that paragraph in his further affidavit. He however did not respond. The law is that for a counter-affidavit to effectively counter an affidavit in support of any application, it must deny the facts in the affidavit support and give its own version of the facts. See **OLA V. UNILORIN & ORS (2014)**

LPELR – 22781 (CA). As it goes for the need for a counter-affidavit to rebut the facts in an affidavit in support, so it goes for the need for a further affidavit to rebut the facts in a counter-affidavit. As I stated earlier, the further affidavit did not deny paragraph 9 of the counter-affidavit. Interestingly, the further affidavit denied quite a number of paragraphs in the counter-affidavit. Having not denied paragraph 9 of the counter-affidavit in his further affidavit, the Appellant cannot be heard to say that the properties he acquired pre-dated the time he was an employee of the NGO. Consequently, I cannot fault the refusal of the lower Court to set aside the interim order of forfeiture.

With regard to the argument of the Appellant's learned Counsel that the lower Court ought to have struck out paragraphs 4, 6, 10, 11, 12, 15 and 16 – 24 of the counter-affidavit for offending the provisions of Section 115 of the Evidence Act, I will not bother with that argument since, even if the Appellant's learned Counsel is right and those paragraphs are struck out, it will have no effect on the correctness of the decision of the lower Court. This is because, as I alluded to earlier in this judgment, the salient paragraph which if struck out would have helped the Appellant's case, is paragraph 9 of the counter-affidavit. The Appellant as earlier pointed out, did not ask that the said paragraph 9 should be struck out.

I now turn to issue 1 which is whether in the circumstances of the interim order of 6th January 2016, the trial Court was right in refusing to grant the Appellant's application. On this issue, the Appellant's learned Counsel contended that in spite of the fact that the lower Court saw the documents relating to the properties acquired by the Appellant, the Court still went ahead to decide the way it did when the Respondent did not produce contrary evidence that can be considered as weightier than that of the Appellant. It was contended that the lower Court did not consider the available evidence before it before it arrived at its decision and that as a consequence, its decision was perverse. A number of cases including **ADELEKE V. IYANA (2001) 13 NWLR PART 721 p. 1; UGUANI V. OKEKE & ANOR (2017) LPELR – 42735 (CA)** were cited in support.

In his argument in response, the Respondent's learned Counsel submitted that the lower Court took into consideration all the available evidence before it arrived at its decision. It was contended that the cases cited by the Appellant's learned Counsel are not relevant to this appeal.

While considering issues 2 and 4, I noted that the gravamen of the Appellant's case is that his properties attached by the interim order of forfeiture were acquired by him before

he was employed by the NGO. This position was punctured by paragraph 9 of the counter-affidavit to which the Appellant did not respond. Since the lower Court considered the case of the parties based on the affidavit evidence before it and paragraph 9 of the counter-affidavit stood unchallenged by the Appellant, the law is that the appellant is deemed to have admitted that the properties were acquired and developed within the period he was an employee of the NGO. See **OWURU 7 ANOR V. ADIGWU & ANOR (2017) LPELR – 4276 (SC)** on the effect of an admission. The documents referred to by the Appellant are Exhibits to the Appellants affidavit in support and therefore are part and parcel of that affidavit by virtue of the doctrine of incorporation by reference. That the lower Court did not consider the documents attached as Exhibits before it arrived at its decision therefore, does arise.

On issues 3, the Appellant's learned Counsel submitted that the interim order of forfeiture was given a lifetime longer than the law allows and therefore the order violated the Appellant's rights. In his argument in response, the Respondent's learned Counsel referred to the interim order and noted that it was made pending the hearing and determination of the main case. Furthermore, the ex-parte order, it was contended, was made pursuant to the powers of the Court under Section 6 of the 1999 Constitution.

A look at the interim order of forfeiture shows that it was not made for an indefinite period or in perpetuity. It was made pending the determination of the case. The order cannot be said to have violated any right of the Appellant. It is a mere preservative order aimed at maintaining the status quo. See **IKONNE & ORS V. NWACHUKWU & ORS (2017) LPELR – 42449 (CA).** If after the determination of the case the Appellant is not found to be liable to the interim forfeiture of his properties, the interim order would lapse and he would be entitled to exercise his rights over the properties. Certainly, the interim order was not made ad-infinitum.

All said, this appeal has no merit. It is dismissed. The Ruling of the lower Court is affirmed.

Obietonbara O. Daniel-Kalio
Justice, Court of Appeal

COUNSEL:

S.O. IDIKWU ESQ. for Appellant.

M.M. GAMBO ESQ. for the Respondent.

CA/K/559/2018

JUDGMENT
(DELIVERED BY OLUDOTUN ADEBOLA ADEFOPE-OKOJIE, JCA)

I have had a preview of the Judgment of my learned brother, **Obietonbara O. Daniel-Kalio JCA** and am in agreement that this appeal has no merit.

I also dismiss it and affirm the Ruling of the lower Court.

Oludotun Adebola Adefope-Okojie,
Justice, Court of Appeal.

CA/K/235A/C/2017

JUDGMENT

(DELIVERED BY JAMES GAMBO ABUNDAGA, JCA)

I have read in advance the lead judgment delivered by my learned brother, Obietonbara O. Daniel-Kalio, JCA. Therein, my Lord lucidly dealt with all the germane issues for determination in the appeal and came to the inevitable conclusion that there is merit in the appeal and allowed same. The conviction and sentence is thus set aside with a consequential order that the Appellant is discharged and acquitted. I adopt all these, with nothing useful to add.

JAMES GAMBO ABUNDAGA
JUSTICE, COURT OF APPEAL