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TEMPLARS ThoughtLab

Reappraising the Constitutionality of Non-Conviction Based Forfeiture of Assets (Civil Forfeiture) in Nigeria

Introduction

The instrumentality of forfeiture of suspected proceeds of crime has, in recent times, emerged as the mechanism of choice for the law enforcement agencies in Nigeria especially the Economic and Financial Crimes Commission ("EFCC") in combating corruption, money laundering, and other economic crimes in Nigeria. Examples abound of the recent grant of interim or final forfeiture orders by Nigerian courts. For instance, on 9 July 2024, the Federal High Court, Lagos ordered the final forfeiture of the sums of \$16,500 and N127m, which were alleged to have been fraudulently diverted from the Nigerian Maritime Administration and Safety Agency (NIMASA).¹ A week later, on 17 July 2024, another judge of the same court ordered the final forfeiture of five properties - No.8b, Bedwell Road, Ikoyi; No.3, Force Road, Ikoyi, Lagos; No.14, Glover Road, Ikoyi, Lagos; No.6, Marina, Ikoyi, Lagos and No. 28, Point Road, Apapa, Lagos - linked to a former Managing Director, Nigerian Army Properties Limited, NAPL.² On 15 August 2024, the same court ordered the interim forfeiture of \$2.04m and seven properties connected to the former Governor of the Central Bank of Nigeria, Mr. Godwin Emefiele.³

The resort to asset forfeiture is grounded in the universally accepted principle that no one should benefit from the proceeds of unlawful activities. It is against the backdrop of the foregoing that former President, Muhammadu Buhari, GCFR on 12 May 2022 signed into law the Proceeds of Crime (Recovery and Management) Act, 2022 ("the Act"). Even before the coming into force of the Act, and thereafter, Nigerian courts have been granting **final** forfeiture orders over assets suspected to be proceeds of crime, without the prior trial or conviction of the owners of such assets thereby raising questions regarding the constitutionality of the measures. In what follows, this publication provides an overview of the legal framework surrounding the forfeiture of suspected proceeds of crime in Nigeria in the absence of conviction.

¹ <https://www.efcc.gov.ng/efcc/news-and-information/news-release/10279-court-orders-final-forfeiture-of-ex-napl-md-properties-in-lagos>

² <https://www.efcc.gov.ng/efcc/news-and-information/news-release/10260-court-orders-final-forfeiture-of-16-500-n127m-diverted-from-nimasa-treasury>

³ <https://punchng.com/court-orders-forfeiture-of-emefieles-2-4m-lagos-delta-assets/#:~:text=The%20Federal%20High%20Court%20in,Godwin%20Emefiele.>

Thereafter the publication will highlight landmark judicial decisions on the subject with a view to exploring the constitutionality or otherwise of non-conviction-based asset forfeiture under the Nigerian legal framework. In the final analysis, the publication proffer solutions on how to navigate this delicate area of the law to achieve its desired end.

The Concept of Asset Forfeiture

Asset forfeiture refers to the confiscation of property or assets of a person by the State on the basis that such property was derived from, or used in the commission of, a crime. Historically, asset forfeiture was preceded by the seizure of the assets, whereby the State through its law enforcement agencies takes possession of property suspected to be connected with a crime as a preliminary action that ensures that the suspected proceeds of crime are not disposed of before the conclusion of an investigation or prosecution.

Forfeiture proceedings can either be criminal or civil in nature, with varying standards of proof. Criminal forfeiture occurs as part of a criminal prosecution and is typically invoked after a person is convicted of an offence. Being part of a criminal prosecution, the State must prove beyond reasonable doubt that the property in question is derived from criminal activities and the forfeiture is part of the penalty imposed on the convict. The Administration of Criminal Justice Act 2015 (ACJA) provides in Section 333 that the court may order the seizure of anything prepared with a view to the commission of an offence and to direct that the thing be forfeited by the owner of the property or confiscated. A conflated reading of mutually related provisions of the ACJA leads to the irresistible conclusion that the seizure, confiscation or forfeiture of property under the Act only arises within the context of punishment for a conviction.

On the other hand, civil forfeiture is not tied to a criminal conviction and can be initiated independently of any criminal proceedings. This type of forfeiture is resorted to where it is difficult or legally impossible to secure a conviction, but the State can still demonstrate that the property is connected to unlawful activities. It is this latter category of asset forfeiture that this publication is concerned with.

Historical Provenance of Civil Forfeiture

Most accounts credit the United Nations Convention Against Corruption (UNCAC) as being the source of the origin of the non-conviction based asset forfeiture procedure. In relation to property acquired through or involved in the commission of an offence, Article 54(c) of the UNCAC mandates each State Party to:

Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Nigeria was one of the first countries to sign the UNCAC in 2003 before going ahead to ratify the Convention in 2004.⁴ As discussed below, it is in apparent compliance with the mandate of the UNCAC that civil forfeiture has become incorporated in the Nigerian legal system.

⁴https://www.unodc.org/conig/uploads/documents/Nigerias_Implementation_of_the_2014_and_2019_UNCAC_Review_Recommendations_UNODC.pdf

Legal Framework for Civil Forfeiture in Nigeria

The Nigerian legal system has several legislative instruments that govern the seizure and forfeiture of proceeds of crime. These include the **Constitution of the Federal Republic of Nigeria, 1999 (as amended)**; the **Criminal Code Act** and **Penal Code Act** applicable as Laws of the various Southern and Northern States in Nigeria respectively; the **Economic and Financial Crimes Commission (Establishment) Act (EFCC), 2004**; the **Advance Fee Fraud and Other Fraud Related Offences Act, 2006 (AFFA)**; the **Terrorism (Prevention) Act, 2011 (as amended)**; **Money Laundering (Prohibition) Act, 2022**; and the **Proceeds of Crime (Recovery and Management) Act, 2022 (PCA)**.

Procedural Aspects

From a reading of the applicable legal instruments, the following key steps emerge as the prevailing procedure for seizure and forfeiture of assets under Nigerian law:

1. **Application for Interim Forfeiture:** the first step involves the application, by the law enforcement agencies, typically the EFCC, to the court for an interim forfeiture order. This is usually sought to prevent the disposal of assets suspected of being proceeds of crime while investigations are ongoing.
2. **Notice to the Owner:** The person whose assets are seized is then given notice of the interim forfeiture order and the application for final forfeiture. At this stage, such a person will be entitled to challenge the seizure or forfeiture in court by proving that the property was lawfully acquired.
3. **Final Forfeiture:** After the conclusion of the forfeiture hearing, the court may, if satisfied on a balance of probabilities that the property is linked to a crime, grant a final forfeiture order, permanently transferring ownership of the property to the government. It bears repeating that this is independent of criminal prosecution or conviction (if any).

Two of the above referenced statutes deserve closer scrutiny. The first is the **AFFA** which, as already mentioned above, allows for the seizure and forfeiture of properties obtained through fraudulent activities. In essence, Section 17 of Act provides that where an officer of the EFCC finds "unclaimed property" in the possession of any other person, body corporate or financial institution or where any property in the possession of such person is reasonably suspected to be proceeds of some unlawful activity, the High Court shall upon an application make an order that the property or the proceeds from the sale of such property be forfeited to the Federal Government of Nigeria. For the avoidance of doubt, the Act makes clear in Section 17(6) that an order of forfeiture under the Act, "shall not be based on a conviction for an offence under this Act or any other law."

Similarly, the **PCA** provides for the grant of preservation orders by the court to preserve property reasonably suspected to have been derived from unlawful activities and which represents instrumentality of unlawful activity or unclaimed property. The Act also provides for the grant of an ultimate forfeiture order against property that is subject of the preservation order. Specifically, the Act provides in Section 7 thereof that recovery and forfeiture are on a non-conviction basis and also provides in Section 8 that the preservation and forfeiture proceedings are civil in nature and the standard of proof required is on a balance of probabilities.

The foregoing therefore raises valid questions regarding the constitutionality of the civil forfeiture mechanism, and in particular, how to justify the seizure or forfeiture of assets of a person who has not been found guilty of the commission of a crime.

Relevant Constitutional Considerations

Nigeria practices constitutional democracy⁵ and there are a number of fundamental principles on which Nigeria's constitutional democracy rests. The premier principle is that of the supremacy of the Constitution. The Constitution emphasises its supremacy in Section 1(1) and (3) thereof to the effect that it is supreme, and its provisions have binding force on all authorities and persons throughout Nigeria, consequently, if any other law is inconsistent with the provisions of the Constitution, the Constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

As an attribute of the supremacy of the Constitution, the Constitution outlines certain fundamental and inalienable rights set out in Chapter 4 thereof which every person or citizen is entitled to as well as the specified circumstances under which such rights may be restricted or withdrawn. One of such rights is the right to acquire and own immovable property anywhere in Nigeria and the guarantee against the taking or compulsory acquisition of any movable property or any interest in an immovable property without the payment of compensation or the right of access to court to determine the adequacy of such compensation.

In terms of procedural safeguards in criminal cases, the Constitution in Section 36(4) grants to every person charged with a criminal offence, the right to a fair hearing in public within a reasonable time by a court or tribunal and in Section 36(5) the Constitution grants such persons the presumption of innocence until proven guilty. Further Section 36(11) provides for the non-compellability of a criminal defendant to give evidence at trial.

The foregoing, coupled with the fact that Nigeria operates the adversarial system of criminal procedure, provides the constitutional basis for the vesting of the burden of proof in criminal cases on the State by the Evidence Act and the fact that such burden generally does not shift to the defendant. It is also the reason why the standard of proof in criminal cases is beyond reasonable doubt.

Against the backdrop of the foregoing overarching principles, it therefore becomes necessary to interrogate the legal validity of a practice or the constitutionality of a law which permits for the final forfeiture of the assets of any person without the prior establishment of the person's guilt by way of conviction. The search for answers must of necessity lead us to the analysis of decided cases by Nigerian courts.

⁵ On 29 May 2024, Nigeria marked, for the first time history, 25 years of uninterrupted democratic rule.

Judicial Decisions on Civil Forfeiture

Several Nigerian court decisions have shaped the application of forfeiture laws. The previous position of the Court was that forfeiture could only be based on conviction. Of particular note is the case of **Nwaigwe & 16 Ors. v. FRN**⁶ where the Court of Appeal per Mukhtar JCA (as she then was) stated as follows in while striking down section 29 of the EFCC Act:

"Forfeiture of property cannot be anything other than punishment... It is quite natural and appropriate when it is inflicted on the appellant after due trial and conviction. Section 29 of the EFCC Act clearly imposes punishment on the appellants by way of forfeiture of property on the basis of mere suspicion. It constitutes an infraction on the rights of the appellants under section 36(5) of the Constitution and is in wild riot or conflict with that constitutional provision. I have no hesitation in finding the provision of section 29 of the EFCC Act as unconstitutional."

Things have since changed, beginning with the case of **Ogungbeje v. EFCC**⁷ in relation to the infamous case of the discovery of huge sums of money at Osborne Towers, Ikoyi. The Court of Appeal held per Tijjani Abubakar, JCA (as he then was) that Section 17 of the **AFFA**, recognizes the power of a court to make an order of forfeiture without conviction for an offence and that on account of the UNCAC, to which Nigeria is a State-party, non-conviction based forfeiture of assets, "is not strange, it is now the order of the day, it is part of international best practice."

The leading Nigerian authority on non-conviction based forfeiture are the cases of **Jonathan v. Federal Republic of Nigeria**⁸ and **La Wari Furniture and Baths Ltd. v. FRN**⁹ where the Supreme Court upheld the constitutionality of the non-conviction based asset forfeiture procedure under Section 17 of the **AFFA**.

In **Jonathan** the Supreme Court characterised the non-conviction based asset forfeiture procedure as an action *in rem* against the property as opposed to an action *in personam* against the owner. Clearly, this is a distinction with a difference. In **La Wari** the Supreme Court was pointedly asked whether Section 1 of the AFFA was in conflict with section 36 and 44 of the Constitution. The apex Court without hesitation answered the question in the negative.

⁶ Nwaigwe & 16 Ors. v. FRN (2009) 16 NWLR (Pt. 1166) 169 at 201 [A-B].

⁷ Ogungbeje v. EFCC (2018) LPELR-45317(CA).

⁸ Jonathan v. Federal Republic of Nigeria (2019) LPELR-46944(SC).

⁹ La Wari Furniture and Baths Ltd. v. FRN (2019) 9 NWLR (Pt. 1677) 262.

Reappraising the Constitutionality of Non-Conviction Based Assets Forfeiture Procedure

While the above undoubtedly represents the position of the law in Nigeria today, and while the rationale behind the introduction of the non-conviction based forfeiture procedure is understandable, it nevertheless leaves more questions than answers.

Firstly, we do not see the justification in conferring on a court exercising jurisdiction in civil cases, the power to impose what is in effect a criminal sanction. What the AFFA and PCA have done, and which the courts have endorsed, is to take away the constitutional safeguards imposed by the Constitution to prevent the abuse of rights. The Supreme Court in **La Wari** rather took the simplistic view that because the AFFA requires the EFCC to publish the interim order so that anyone who might be affected by the order for forfeiture could appear in court within 14 days to show cause why the final order for forfeiture should not be made or granted, it therefore meant that the argument of a breach of fair hearing was baseless.¹⁰

As earlier noted, the Constitution provides for several layers of safeguards to ensure that the rights of every person charged with a criminal offence are protected. Apart from the right to be heard, other rights include the presumption of innocence, the imposition of the burden of proof on the State and by implication the imposition of a high standard of proof, beyond reasonable doubt. In our view, allowing the owner of the property, the opportunity to be heard, and proceeding to grant a final forfeiture order in the absence of conviction and on a balance of probabilities falls short of satisfying the Constitutional safeguards.

Secondly, while it is true that the courts, in many cases mandate the law enforcement agencies to publish the interim order in a national daily, it is not an express condition under both the AFFA and the PCA, and in some cases, the courts do not impose the condition. A reading of Section 17(a) of the AFFA reveals that the Act provides that the court shall not make a final forfeiture order until “notice or publication as the High Court may direct has been given or made for any person, corporate or financial institution in whose possession the property is found or who may have interest in the property or claim ownership of the property to show cause why the property should not be forfeited to the Federal Government of Nigeria.” On its part, the PCA provides in Section 10 (1) that, “The Court in making a preservation order, may direct the relevant organisation to within 14 days after the making of the order notify any interested party of the preservation order by publishing same in any widely circulating national newspaper.”

The foregoing falls short of the time-honoured requirement of constitutional and administrative law that any law affecting individual rights and liberties must be reasonably certain and predictable. The AFFA for instance appears to give to the law enforcement agencies the option of either serving the interim forfeiture order on the owner of the property or on the person in possession of the property, not being the owner. Indeed, there have been credible complaints of the law enforcement agencies applying for and obtaining final forfeiture orders against the funds belonging to different people after serving the interim forfeiture order on the banks, in compliance with the AFFA and without notice to the owners of funds. While this complies with the strict letters of the AFFA, it is clearly abusive of the intent behind the enactment of the Act. To prevent further abuse, the Supreme Court must therefore make it clear that the “may” in Section 10 (1)

¹⁰ *La Wari Furniture and Baths Ltd. v. FRN* (2019) 9 NWLR (Pt. 1677) 262 at 300 paras A & H.

of the PCA must be interpreted as a “shall” and that the law enforcement agencies must ensure that the interim order is either published in a national daily or otherwise brought to the attention of the owner of the property, and not just the person in possession of the property, such as a bank or other financial institution.

Thirdly, the Supreme Court in **La Wari** held that the provision in Section 17 of the AFFA which requires any person affected by an interim forfeiture order to show cause why the property should not be forfeited imposes on such person the burden of proving that the property was acquired *bona fide*.¹¹ This, coupled with the provision that has lowered the standard of proof in civil forfeiture cases, is precisely the mischief that has been occasioned by both the AFFA and the PCA in that they have unwittingly imposed the burden of proof of the defendant in breach of the well-established position that the burden of proof rests at all times with the State.

Lastly, it is not clear why the Supreme Court in **La Wari** relied on Section 44(1)(k) of the Constitution to justify civil forfeiture proceedings.¹² The said Section 44(1)(k) of the Constitution provides that one of the circumstances where the taking of the property of a Nigerian citizen shall not be deemed as a breach of the Constitution is where such taking is in relation to, “temporary taking of possession of property for the purpose of any examination, investigation or enquiry.” Clearly, a final forfeiture order is neither temporary nor is it for the purpose of investigation. It constitutes a permanent transfer of interest in the property to the Federal Government of Nigeria.

Conclusion

The legal framework for the seizure and forfeiture of proceeds of crime in Nigeria has evolved significantly, with recent reforms strengthening the State's capacity to recover illicit assets. One such reform is the introduction of the non-conviction-based asset forfeiture procedure. As laudable as this mechanism is, there are concerns that law enforcement agencies have begun to misuse their powers which could undermine public confidence in the system. The courts therefore have a role to play in ensuring that the mechanism is used effectively and that the rights of individuals are balanced against the need to combat illicit enrichment.

So far, the decisions emanating from Nigerian courts have been in favour of the mechanism of non-conviction based forfeiture, even at the risk of contravening long-established principles. There is urgent need for Nigerian courts especially Supreme Court to revisit their decisions in this regard to ensure fidelity to the Constitution and respect for the rights of Nigerians. Before then, however, the instrumentality of forfeiture of suspected proceeds of crime will remain the mechanism of choice for the law enforcement agencies, and owners of assets and funds which are suspected to be proceeds of crime must therefore be ready to satisfactorily fulfil their source of funds obligations.

¹¹ *La Wari Furniture and Baths Ltd. v. FRN* (2019) 9 NWLR (Pt. 1677) 262 at 301 – 302 paras H-B.

¹² *La Wari Furniture and Baths Ltd. v. FRN* (2019) 9 NWLR (Pt. 1677) 262 at 302 paras E-F.