

An Assessment of Making a Case for Civil Asset Forfeiture Law in Nigeria

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Abstract

Asset forfeiture otherwise called asset confiscation is the seizure of asset of persons who have been tried and convicted of corrupt enrichment and/or other financial crimes. However, the legal huddles inherent in the trial and conviction of such persons accused of corruption and other financial malfeasances, the financial implication involved, including appeals and further appeals up to the Supreme Court makes the entire process distasteful. The non conviction based asset forfeiture, as a routine punishment, is aimed at confiscating the proceeds or instruments of crime. The trial takes the form of civil litigation with the main aim of obtaining a court order nisi, and where the defendant fails to satisfy the court as to the source(s) of his wealth, the court makes an order absolute thus forfeiting the asset of the defendant to the Government in a civil trial. In the United Kingdom, for instance, asset forfeiture proceedings are initiated under the Proceeds of Crime Act. The aim of this research is to, inter alia, make a case for the enactment of a civil Asset Forfeiture Law in Nigeria in order to strengthen the provisions of the Constitution dealing with non-conviction based forfeiture; to aid the activities of anti-graft and other security agencies in the fight against corruption and other financial crimes. The researchers make use of the doctrinal or library-based method of research, therefore, references will be made to both primary and secondary sources of information such as Statutes and other scholarly works. It is the finding of this research that Nigeria does not have a solid legal framework for non-conviction based asset forfeiture law. It is therefore recommended that legislative and institutional reforms be made to strengthen the governments' mandate in fighting corruption, and what better way of achieving this than by introducing a law on civil asset forfeiture.

Keywords: Nigeria, Law of Forfeiture, conviction, asset.

1.1 Introduction

Asset generally means property but the definition of asset will, to a large extent be determined by the nature of the property in issue and the circumstance of such property. An

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asset is any property, real or personal, whether tangible or intangible, that has financial or sentimental value and can generally be used to for the repayment of debt owed the owner of the property.

In bankruptcy, an asset is any form of property owned by a debtor who is insolvent that is not exempt from being used to repay debts.¹ For income tax purposes, an asset is property held by a taxpayer for personal enjoyment or investment. Asset thus can be fixed, frozen or floating; it can be tangible or intangible, real or choses in action. The Black's Law Dictionary² on the other hand, defines an asset as a property that is owned and has value.

The word "forfeiture" according to Kekere-Ekun JSC in *Abacha v. Federal Republic of Nigeria*³, borrowing from the Black's Law Dictionary means the divestiture of property without compensation. The loss of a right, privilege or property because of a crime, breach of obligation or neglect of duty... title is instantaneously transferred to another such as the government, a corporation or a private person. Therefore, forfeiture connotes punishment for a crime committed and its effect is instantaneous.

Black's Law Dictionary, defines forfeiture as the divesture of property without compensation.⁴ It is the loss of right, privilege, or property because of a crime, breach of obligation or neglect of duty. Title is instantaneously transferred to another, such as government, a corporation, or a private person. A civil or *in rem* forfeiture is initiated through civil proceeding brought by the government against the property that either facilitated a crime or was acquired as a result of criminal activity. Criminal forfeiture on the other hand is initiated by the governmental through criminal proceeding brought against a person to seize property as punishment for the person's criminal behavior.

1.2 Nature of Forfeiture

Asset forfeiture relates to the transfer of rights, title and interest in the property which is the subject matter of an offence to the government, usually after conviction. Forfeiture can also be described as the loss of property, rights or benefits as a penalty for doing or omitting to do some act.⁵ It can also be described as the surrender or loss of property as a penalty or failure to act in accordance with legal requirement. It also refers to the laws and regulations that permit the government to seize assets of persons who have been suspected or convicted of a crime.

¹<<https://legal-dictionary.thefreedictionary.com/Asset>> accessed 13/08/2021 at 02:36 pm.

²Byan A. Garner, Black's Law Dictionary 8th Ed. (West Publishing Company, 2004) 125.

³ (2014) 6 NWLR (pt.1402) page 122.

⁴ Bryan A. Garner, op cit, 677.

⁵ Babatunde Oni, "Non Conviction based Criminal Forfeiture and Right to own Property in Nigeria. Enhancing the Benefit and Engaging the Problems." *IOSR Journal of Mathematics (IOSR-JM)* e-ISSN: 2278-5728, p-ISSN: 2319-765X. Volume 9, Issue 3 (Nov. – Dec. 2013) 24.

Civil asset forfeiture, on the one hand can be described to mean the legal regime that permits the government to seize assets or properties without filing criminal charges against the defendant. Civil asset forfeiture otherwise called non-conviction based confiscation, sometimes referred to as “*in rem confiscation*”, “objective confiscation” or “extinction de domino”, authorizes the confiscation of assets without the requirement of a conviction. As it is typically a property-based action against the asset itself, not against the person with possession or ownership, non-conviction based asset confiscation generally requires proof that the asset is the proceeds or instrumentalities of crime. In addition, a conviction is not required.⁶

1.3 The Legal Regime on Asset Forfeiture in Nigeria

Section 43 and 44 of 1999 Constitution⁷ guarantees the right of every Nigerian citizen to acquire and own both moveable and immovable properties anywhere in Nigeria and that no person or authority shall compulsorily acquire another person’s interest in property except where it is permissible by law and where prompt payment of compensation is made. Going further, the Constitution made it abundantly clear in Section 44(2) that this right is not absolute in that a person may forfeit, or his property may be confiscated where there is an imposition of penalties or forfeiture for the breach of law whether under civil process or after conviction for an offence.

Similarly, Sections 28 – 31 of the Economic and Financial Crimes Commission Act⁸ provides that where the assets or properties of any person arrested for an offence under the Act has been seized, the Commission shall cause an *ex-parte* application to be made to the Court for an interim order of forfeiture and the Court shall, if satisfied that there is *prima facie* evidence that the property concerned is liable to forfeiture, make an interim order forfeiting the property to the Federal Government and where a person is convicted of an offence under the Act, the Commission shall apply to the Court for the order of confiscation and forfeiture of the convicted person’s assets and properties acquired or obtained as a result of the crime already subject to an interim order under this Act. It is worthy to note that all these legislations are criminal legislations and there provisions deal with criminal trials and procedure, therefore, these legislations recognize that assets of criminal defendants can be confiscated at the interim during the pendency of a criminal trial or final forfeiture can be ordered only after conviction is secured.

Similar provisions exist under different laws in Nigeria empowering the court to order the forfeiture of properties suspected to have been acquired or used for the commission of

⁶ Module 5 Asset Recovery Process and Avenues for Recovering Assets (adopted from the Handbook for Practitioners on Asset Recovery under STAR Initiative) cited with approval in Rotimi Jacobs, *SAN*, Asset Recovery and Confiscation: Practice And Procedure Being, A Paper Presented on 27th August, 2019 at the Workshop For Investigators and Prosecutors Organised by the National Judicial Institute (NJI), Abuja, 10.

⁷ 1999 Constitution of the Federal Republic of Nigeria (as Amended).

⁸ Economic and Financial Crimes (Establishment, etc.) Act, Cap. EI, LFN, 2004.

crime, for example, Sections 14 – 17 of the Advance Fee Fraud and other Fraud Related Act⁹, Section 47 of the Corrupt Practices and other Related Offences Act¹⁰, Section 19(2) of the Money Laundering (Prohibition) Act¹¹ and Section 82(2) of the Administration of Criminal Justice Act¹². Also, where the Code of Conduct Tribunal finds a public officer guilty of contravention of any of the provisions of the Code, it may impose punishment which include seizure and forfeiture to the state of any property acquired in abuse or corruption of office.¹³

In the case of *La Wari Furniture and Baths Ltd. v. FRN & Anor*¹⁴, the Court of Appeal, while reiterating the validity of asset forfeiture laws, held that the cases cited to us by the learned Counsel to the 1st Respondent from the European Court of Human Rights and other jurisdictions the world over have shown us on a comparative basis that forfeiture of properties suspected to be proceeds of crime is not unconstitutional.

From the above Constitutional and Statutory provisions, with few exceptions which we shall consider hereinafter, it is abundantly clear that our legal framework contemplates asset forfeiture pursuant to criminal proceedings.

1.4 Types of Asset Forfeiture in Nigeria

1.4.1 Forfeiture of property related to specific offence: This enables the court to make an order depriving the offender of any right he might have in a property whether real or personal, where the property was the by-product of the alleged offence. Section 18(2) of the Money Laundering Act¹⁵, for instance, provides that where a body corporate has been convicted of an offence under the Act, such body corporate shall be wound up and its assets forfeited to the government. Similarly, Section 47 of the Corrupt Practices and other Related Offences Act¹⁶ empowers the court to make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence, even if the offence is not proved against the accused provided the court is satisfied that the accused is not the true and lawful owner of such property and that no other person is entitled to the property in good faith.¹⁷

1.4.2 Forfeiture of Forbidden Articles: Where the law prohibit the possession or exposure to view or offering for sale of certain types of article, forfeiture will be found as a method

⁹Cap A6 LFN 2004.

¹⁰Cap 357 LFN 2004.

¹¹Cap C31 LFN 2004.

¹²ACJA 2015.

¹³Babatunde Oni, op cit. p. 30.

¹⁴(2018) LPELR-43507 (CA), R. 1.

¹⁵Cap C31 LFN 2004.

¹⁶Cap 357 LFN 2004.

¹⁷Babatunde Oni, op cit, p. 38.

of enforcement. For example, obscene publication¹⁸, firearms and offensive weapons may be ordered to be forfeited after a conviction.¹⁹ Smuggled goods may also be confiscated and forfeited to the state.²⁰

1.4.3 Forfeiture of Instruments of Crime: The court has the general power to confiscate property used in the commission of offences.²¹ The court has the power under the Criminal Code to order the forfeiture of any personal property used in the commission of postal offences. Property regarding which any offence appears to have been committed may be liable to forfeiture, usually after conviction.

1.4.4 Forfeiture of unclaimed asset: That Section 17 of the Advance Fee Fraud Act²² provides to the effect that where any property has come into the possession of any officer of the Commission as unclaimed property or any unclaimed property is found by any officer of the Commission to be in the possession of any other person, the High Court, after having being satisfied that said property is an unclaimed property, may make an order that the property or the proceeds from the sale of such property be forfeited to the Federal Government of Nigeria.

1.5 Application of Nigerian Law in Civil Asset Forfeiture

As earlier pointed out, Section 44 of the Constitution sets the runway for civil asset forfeiture in Nigeria as was held in the case of *Dame Mrs. Patience Ibifaka Jonathan v. Federal Republic of Nigeria*²³ that the provision of Section 44 (2) (b) of the Constitution provides a disjunctive “or” in between the words “whether under civil process” AND “after conviction for an offence”. It is clear from the foregoing that it is not only “after conviction for an offence” will a citizen’s property be forfeited as shown from the decision of the Court of Appeal in the instant case.

Even with the provision of Section 44 (2) (b) of the 1999 Constitution, there exist no law in Nigeria which expressly provides for civil asset forfeiture as all the laws above cited that form the legal framework of asset forfeiture are criminal legislations. While Section 17 (6) of the Advance Fee Fraud and other Fraud Related Offences Act²⁴, which provides for non conviction based asset forfeiture is the closest thing we have in Nigeria to civil asset forfeiture. The section provides that “an order of forfeiture under this section shall not be based on a conviction for an offence under this Act or any other law.” It has been humbly

¹⁸ Sections 23 and 24 of the Cyber crime (Prohibition, Prevention Etc.) Act 2015.

¹⁹ Section 7 of the Robbery and Firearm (Special Provisions) Act Cap F28 LFN 2004.

²⁰ Babatunde Oni supra, p. 32.

²¹ Section 7 of the Robbery and Firearm (Special Provisions) Act Cap F28 LFN 2004.

²² Cap A6 LFN 2004.

²³ LER (2018) CA/L/578/2017.

²⁴ Cap A6 LFN 2004.

submitted that this law relates only to cases of advanced fee fraud and where a property is abandoned by the defendant.²⁵

Juxtaposing this section and that of section 47 of the ICPC Act which empowers the Court to make an order for the forfeiture of any property which is proved to be the subject matter of an offence or to have been used in the commission of an offence, even if the offence is not proved against the accused provided the court is satisfied that the accused is not the true and lawful owner of such property and that no other person is entitled to the property in good faith will reasonably suggest that section 17 (6) of the Advance Fee Fraud and other Fraud Related Offences Act restating the provision of the ICPC Act in that property of an accused person can be confiscated in the *interim* (i.e. before conviction pursuant to a criminal trial).

It is our humble opinion that the court misdirected itself in *La Wari Furniture and Baths Ltd. v. FRN & Anor*²⁶, when it held that one cannot in all seriousness ignore the historical perspective and international dimension to the provision of Section 17 of the Advance Fee Fraud and other Fraud Related Offences Act 2006 and such similar provisions in our extant jurisprudence. This is so, notwithstanding the rather legalistic argument of the learned Senior Counsel for the Appellant that the provision of Article 54 of the United Nations Convention Against Corruption (UNCAC) is yet to be domesticated in Nigeria under Section 12 of the Constitution of the Federal Republic of Nigeria 1999 as amended. There is no gainsaying that the said Section 17 of the Advance Fee Fraud and other Fraud Related Offences Act was enacted in line with Article 54 of the United Nations Convention on Corruption (UNCAC) and also in line with current attitudes worldwide towards the Administration of Criminal Justice and Prevention of Crime. Clearly and as pointed out by the learned Counsel to the 1st Respondent, the Non-Conviction Based (NCB) forfeiture as contained in Section 17 of the Advance Fee Fraud and Other Fraud Related Offences Act is not limited to Nigeria.

This opinion, it is respectfully submitted, is perverse and contrary to the intention of the drafters of the Act. The long title of the Act reads “An Act to prohibit and punish certain offences pertaining to Advance Fee Fraud and other fraud related offences and to repeal other Acts related therewith.” From the foregoing long title, it is clear that the Advance Fee Fraud and other Fraud Related Offences Act is a criminal enactment, therefore cannot provide civil procedure or remedies as this will go contrary to Section 36(12) of the

²⁵Rotimi Jacobs, *SAN*, Asset Recovery and Confiscation: Practice And Procedure Being A Paper Presented on 27th August, 2019 at the Workshop For Investigators and Prosecutors Organised by the National Judicial Institute (NJI), Abuja, p. 13.

²⁶ (2018) LPELR-43507 (CA), R. 1.

Constitution²⁷. A civil claim can only be brought based on a Tort or contract, while fraud is a criminal offence.

In the case of *R (on the Application of Alamiyeseigha) v. Crown Prosecution Service*,²⁸ Alamiyeseigha absconded from the United Kingdom and his criminal trial could not continue. After he had absconded, criminal confiscation of English assets on conviction was no longer possible. Alternative mechanisms were necessary. The assets that have been frozen comprised cash, properties and bank balances. The cash was straight forward: forfeiture proceedings under Proceed of Crime Act²⁹ was successfully used as a Metropolitan Police applied for the confiscation of cash and the Nigerian Government intervened to seek an order as victim for its return. Nigeria does not have similar provision that permits civil forfeiture of assets and an accused person who absconds from Nigeria cannot have his property forfeited finally in Nigeria because he has not been convicted of any crime. Nigerian Government similarly used the same procedure to initiate proceedings in the United Kingdom for the recovery of the assets of General Sanni Abacha without any criminal conviction secured.³⁰

1.6 Analysing Civil Asset Forfeiture Law in Nigeria

Although the position of the law relating to civil asset forfeiture is as contained in *La Wari Furniture and Baths Ltd. v. FRN & Anor*,³¹ notwithstanding the arguments canvassed hereinbefore, it will be highly beneficial if the National Assembly will take the bold leap in enacting a law that deals specifically with civil asset forfeiture or to simply domesticate the United Nations Convention Against Corruption pursuant to Section 12 of the 1999 Constitution³². The Constitution has already laid the groundwork in which this law will be made. The conviction of a defendant in Nigeria is a pre-requisite for obtaining a final order for the forfeiture of suspected asset, this means that criminal forfeiture which is conviction-based forfeiture is what applies in the country and civil forfeiture is yet to be codified in Nigeria.³³ Forfeiture proceedings are part of the sentencing process in Nigeria. Where there is a final forfeiture order, the properties subject to the order are usually forfeited to the Federal Government.³⁴

²⁷ 1999 Constitution of the Federal Republic of Nigeria as amended 2011.

²⁸ (2006) Criminal LR 669.

²⁹ 2002.

³⁰ Rotimi Jacobs, op cit at p. 12.

³¹ (2018) LPELR-43507 (CA), R. 1.

³² 1999 Constitution of the Federal Republic of Nigeria as amended 2011.

³³ Chukwuemeka Castro Nwabuzor, "Codifying Civil Asset Forfeiture in Nigeria"

<<https://nials.edu.ng/index.php/2015-12-10-16-05-04/seminar/219-codifying-civil-asset-forfeiture-in-nigeria>>
accessed 17 July, 2019 at 3:18 pm.

³⁴ Section 20(2) of the Economic and Financial Crimes Commission Act, Cap E7 LFN 2004.

Therefore, civil forfeiture is non-conviction based and its features are best highlighted when juxtaposed with criminal forfeiture. The action under civil forfeiture is against the property and not against the person as is the case with criminal forfeiture. A civil forfeiture action can be initiated before during, or even after criminal conviction. The action can also be initiated where no charge has been laid against a suspect unlike criminal forfeiture that is imposed as part of sentence.³⁵ Before a final forfeiture order is made, a conviction is required under criminal forfeiture which is not the case with civil forfeiture. Civil forfeiture seeks to incapacitate criminal organisations and reduce their power and influence by divesting corrupt officials of their ill-gotten gains.³⁶ In civil forfeiture proceedings, the property is the defendant. Thus the fact that proceedings are initiated against a crime-tainted property does not stop the prosecution of the criminal defendant who has connection with the property. Civil forfeiture however makes it less cumbersome and faster to recover the proceeds of crime as there will be no need to wait till the end of a lengthy trial before a final forfeiture order can be obtained. Further, the burden of proof under civil cases is much lesser than the standard required to obtain a conviction. Also, where the criminal is divested of the proceed of crime through civil asset forfeiture, his eventual conviction will be easier because he has been financially incapacitated.

1.7 Conclusion and Recommendations

It is a well-known fact in Nigeria that criminal conviction is financially demanding on the part of the prosecution and the defendant, time wasting, especially trial of persons accused of financial crimes and other corruption related offences. The docket of our courts are proliferated by cases of former governors and elected representatives who have been accused of one form of corruption or the other and these cases have been going on for years. For example, it took the EFCC close to ten years before finally securing conviction of former governors Joshua Dariye of Plateau state Jolly Nyame of Taraba state. This compared to the relative ease with which the EFCC was able to recover billions of Naira from Mrs. Patience Jonathan, the former first lady of Nigeria only goes to emphasis the merits of civil asset forfeiture and it is hoped that a proper legal framework will be laid to that effect. Further, Nigerian government should borrow leave from other countries whose civil asset forfeiture laws Nigeria has benefitted from. For instance, at the end of the inaugural Global Forum on Asset Recovery, the Nigerian Federal Government and its Swiss counterpart announced the signing of the agreement to repatriate 321 million Dollars of the Abacha loot. There still remains a host of assets to be recovered by the Nigerian government and all efforts may be in vain unless the government actively considers taking advantage of civil asset recovery.

³⁵ See the case of *Dame Mrs Patience Ibifaka Jonathan v. Federal Republic of Nigeria* LER (2018) CA/L/578/2017.

³⁶ Chukwuemeka Castro Nwabuzor, op cit.

Similarly, there is the need strengthen the ability of law enforcement agencies, prosecution services and judicial bodies to implement international cooperation mechanisms into the asset recovery process, thereby ensuring the collection of evidence, as well as the seizure and confiscation of property beyond national borders. Targeted technical assistance and capacity-building measures should be addressed.

Finally, there is the need to harmonise and coordinate the activities of all agencies of government, particularly the law enforcement agencies and financial institutions relating to information gathering and sharing, incorporating civil and commercial tools and practices, particularly in relation to different types of properties, legal entities and services which may be used by the perpetrator(s) to launder the proceeds and instrumentalities of crime.