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IN THE FEDERAL HIGH COURT
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT ABUJA

SUIT No. FHC/ABJ/CS/14/2017

IN THE MATTER OF AN APPLICATION BY THE CHAIRMAN OF THE ECONOMIC AND FINANCIAL CRIMES COMMISSION FOR AN ORDER OF INTERIM ATTACHMENT OF OIL PROSPECTING LICENSE 245 PRESENTLY HELD BY SHELL NIGERIA EXPLORATION AND PRODUCTION COMPANY LIMITED (SNEPCO)

BETWEEN

SHELL NIGERIA EXPLORATION & PRODUCTION COMPANY LIMITED ... APPLICANT

AND

CHAIRMAN ECONOMIC & FINANCIAL CRIMES COMMISSION ...RESPONDENT

APPLICANT'S REPLY ADDRESS ON POINTS OF LAW



Submitted By:
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(Led by Prof. Konyin Ajayi SAN)
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Reply - 150.00
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A. INTRODUCTION

1. This Reply Address is filed in response to the Respondent's Counter Affidavit deposed to by Ibrahim Ahmed ("IA Affidavit") and Written Address ("RWA"), both dated 24.02.17, and filed in opposition to the Applicant's Motion to dismiss the suit or [in the alternative] discharge the interim order of attachment, dated and filed on 01.02.17 ("Application").

B. ARGUMENTS

Is the Counter Affidavit Useable?

2. Your lordship's attention is drawn to paragraphs 14, 15, 16, 18, 19, 22, 23, 24, 26, 27, 28, 29, 31, 32, 33, 34, and 35 of the IA Affidavit, which clearly contravene *Section 115(2), Evidence Act*. These paragraphs should be struck out for being fraught with arguments, prayers and legal conclusions - following the decision of the Supreme Court in **Bamaiyi v. State** [2001] 8 NWLR (Pt. 715) 270 at 289(C-F).
3. Alternatively, your lordship is enjoined not to attach any weight to the affected depositions and ignore or discountenance all the arguments of the Respondent premised on the said incompetent depositions. See **Josien Holdings Ltd v. Lornamead Ltd** (1995) 1 NWLR (Pt.371) 254.

What Is the Effect of Failure to contradict Applicant's Affidavit?

4. The Respondent failed to contradict or deny several depositions in the Affidavit in support of the Applicant's Motion on Notice, particularly paragraph 9 thereof, which is at the heart of the Applicant's Motion challenging the *Ex parte* Originating Summons.
5. Other than the bland assertion in paragraph 3.3 of the RWA that "*the applicant has woefully failed to substantiate or prove the allegation of misstatement or suppression of fact...*", the Respondent has failed to challenge the materiality of the allegations in the Applicant's Affidavit.
6. In effect the Respondent is deemed to have admitted the allegations of misrepresentation in the said paragraph 9 of the Applicant's Affidavit. See **Nwanganga v. Government of Imo State** [1987] 3 NWLR (Pt. 59) 185.
7. Based on the foregoing your lordship is urged to accept as true and correct,

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and act upon the allegations made in the Applicant's Affidavit, in particular, paragraph 9 thereof.

Should The Case Be Dismissed Or Struck Out On Ground Of Concessions?

8. The Applicant's arguments that:

8.1 the court lacks the *vires* to grant the interim order as (x) the Chairman, EFCC was not the proper party to approach the court seeking orders under Section 28, EFCC Act [*paragraphs 14 - 22, Applicant's Written Address*];

8.2 the *Ex-Parte* Originating Summons filed by the Respondent was (x) not issued following due process of the law [*paragraphs 23 - 31, Applicant's Written Address*], (y) an abuse of court process [*paragraphs 32 - 62 Applicant's Written Address*], and (z) is unconstitutional and an abuse of power [*paragraphs 63 - 79, Applicant's Written Address*];

8.3 the Oil Prospecting License (OPL) is not property within the contemplation of the EFCC Act [*paragraphs 34 - 47, Applicants Written Address*];

8.4 the EFCC's *ex parte* application is improper because the Applicant's rights in OPL 245 cannot be transferred, sold, assigned or mortgaged without the consent of the Federal Government of Nigeria (FGN) [*paragraphs 4 - 12, Applicants Written Address*];

have not been met by the Respondent anywhere in its RWA.

9. Thus, the submissions in paragraphs 4 to 79 of the Applicant's Written Address, are wholly unchallenged by the Respondent and, accordingly, are deemed to have been conceded on the authority of **Boaja v. Akintoye-Sowemimo** [2008] 16 NWLR (Pt. 1113) 278 at 291.

Is The Interim Order To Attach Or Forfeit?

10. The Respondent, in an attempt to mislead the court, mischaracterized the interim order as an "Ex parte Order of Interim Forfeiture" in paragraphs 1.0, 3.1, 3.5 and 3.8 of the RWA.

11. Contrary to the Respondent's erroneous representation, the Order made by the Court was an interim order attaching OPL 245. Whilst the Respondent, in

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paragraph 3.8 of the RWA, attempted to associate the "order of attachment" with "interim forfeiture", as the *Ex parte* Originating Summons bears out, the Respondent **never** sought interim forfeiture of OPL 245 and the Order granted was, in any event for "interim attachment" and not forfeiture.

12. It is important to set out the foregoing, to make clear the misrepresentation by the Respondent, and because Section 26, EFCC Act cited by the Respondent in paragraph 3.5 of the RWA, although nominally relied upon in the *Ex-Parte* Originating Summons is not relevant to this matter which relates, at the risk of repetition, to an order of attachment and not forfeiture of the Applicant's asset.

Does the Court have power to set aside the Interim Order?

13. The Respondent at paragraph 3.1 of the RWA, without citing a single authority, emptily contends that your lordship lacks the power to entertain the Applicant's application on the ground that the order was obtained pursuant to the EFCC Act, which does not provide for the filing of an application to set aside the order.
14. This contention is irredeemably flawed because this honourable Court has the inherent power under Section 6 of the Constitution of the Federal Republic of Nigeria (as amended) (CFRN) to grant the Applicant's application and this constitutional power of the Court cannot be taken away or abridged by legislation (in this case, the EFCC Act). See the Supreme Court's decision in **Eleazor v. Innocent Ibero & Anor** [1994] 1 NWLR, (Pt. 322) 503.
15. Further, it is a trite principle of our law that where there is a wrong, the courts will provide a remedy. See **Bello & Ors v A.G. Oyo State** [1986] 2 N.S.C.C. 1257. This principle, regularly referred to as *ubi jus ibi remedium*, also forms the basis of powers granted to your lordship under Section 6(3) & (6) of the CFRN and Sections 1(3), 9(2), 10, 11 and 24 of the Federal High Court Act 2004. Thus, even if EFCC Act does not provide for setting aside of interim orders, it is clear as distilled from cases too numerous to number that a court that erroneously grants an unconstitutional, or unlawful, or irregular *ex parte* order can set it aside.
16. On this score, the Applicants commend to your lordship the decision of the

Court of Appeal in **Dangabar v Federal Republic of Nigeria** (2012) LPELR 10732 (CA), where the appellate court expressly recognised the right of an aggrieved person to apply to set aside an order obtained pursuant to Section 28 of the EFCC Act.

- 17. Besides the EFCC Act does not [and, indeed, cannot] proscribe filing of an application to set aside an interim order of attachment where it was improperly obtained, or without due process of law, or was granted without jurisdiction, or represents an abuse of power on the part of the EFCC – all as in this case.
- 18. In the circumstances, the Applicant urges your lordship to hold that this court has the jurisdiction and in fact, the inherent power to entertain and grant the Applicant’s application.

Is There Impropriety in the Interim Order?

- 19. The Respondent at paragraph 3.5 of the RWA contended that:-
 - 19.1 the Applicant misconceived the law, in arguing that the Respondent failed to comply with the preconditions to the exercise of the powers in Sections 28 and 29 of the EFCC Act;
 - 19.2 the law has moved beyond the decision in **Nwaigwe v Federal Republic of Nigeria** [2009] 16 NWLR (Pt. 1166) 169 and that the applicable case is **Dangabar v Federal Republic of Nigeria**; and
 - 19.3 Section 44(2)(k) of the CFRN permits the Respondent to bring application for interim attachment of assets pending investigation and prosecution.
- 20. On the first of these arguments, we commend to your lordship the express recognition by the Court of Appeal in **Dangabar’s case** that vital preconditions must be satisfied before an application for attachment or forfeiture under Sections 28 & 29, EFCC Act, can be granted. Indeed, the Court’s *ratio decidendi* in that case was, in part, based on the fact that the FGN had followed due process. This, the EFCC has unfortunately failed to do in this case, nor sought to show in the IA Affidavit.
- 21. On the second, we note that while **Nwaigwe’s case** was indeed cited in argument in **Dangabar’s case**, the former was not overruled by the latter.

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The Court of Appeal in **Nwaigwe's case** held section 29 EFCC Act to be unconstitutional on the ground that forfeiture prior to conviction, even if interim in nature, offends against the constitutionally guaranteed principle of "innocent until proven guilty", a point made by the Applicant. No question of forfeiture, whether interim or otherwise, was raised in **Dangabar's case**; rather, the decision of the Court was based on interim attachment under Section 28 EFCC Act. As such, and contrary to the position of the Respondent, the **Nwaigwe's case** remains good law with respect to the unconstitutionality of Section 29 EFCC Act and was not overruled or even contradicted by **Dangabar's case**. **But the point really is that this is a case of Section 28 EFCC Act attachment and not Section 29 EFCC Act forfeiture.**

- 22. On the third point, it is not the case that the Interim Order was made for the purpose of an examination or inquiry into OPL 245. Accordingly, the provisions of Section 44(2)(k) CFRN relied upon by the Respondent are not satisfied in the instant case. The asset in question, being an asset, whose operation, is already within the overall control and regulation of the FGN in accordance with the provisions of the Petroleum Act, is not capable of preservation by an order of court and no such order of attachment is required to examine or enquire into the document evidencing the Applicant's rights or the huge expanse of Nigeria's continental shelf to which the said document relates.

Should The Court give weight to Exhibit EFCC 6?

- 23. The Respondent relies on **Exhibit EFCC 6** a putative prospective criminal charge conceivably to show that the Respondent is investigating and will prosecute the Applicant.
- 24. **Exhibit EFCC 6** was not brought at the time the *Ex parte* Originating Summons was filed, we therefore urge your lordship to take the view that **Exhibit EFCC 6** was recently made by a person interested when proceedings were pending or anticipated, and as such, the document must be rejected as being inadmissible. See Section 83(3) Evidence Act 2011. See also **Ogidi v Egba** [1999] 10 NWLR (Pt. 62) 42 at 47.

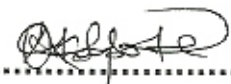
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CONCLUSION

25. In the circumstances, the Applicant respectfully urges this honourable Court to resolve the issues for determination in the Applicant's favour and grant the reliefs as sought on its Applicant's Motion.

Dated this 27th day of February 2017



.....
Abayomi Okubote
(Led by Prof. Konyin Ajayi SAN)

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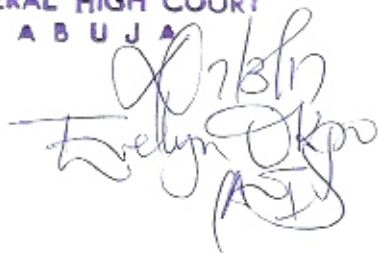
LIST OF AUTHORITIES

1. Bamaiyi v. State [2001] 8 NWLR (Pt. 715) 270
2. Bello & Ors v A.G. Oyo State [1986] 2 N.S.C.C. 1257
3. Boaja v. Akintoye-Sowemimo [2008] 16 NWLR (Pt. 1113) 278
4. Dangabar v Federal Republic of Nigeria (2012) LPELR 10732 (CA)
5. Eleazor v. Innocent Ibero & Anor [1994] 1 NWLR, (Pt. 322) 503
6. Fasheun v. AG Federation [2006] 6 NWLR (Pt. 975) 141
7. Josien Holdings Ltd v. Lornamead Ltd (1995) 1 NWLR (Pt.371) 254
8. Nwaigwe v Federal Republic of Nigeria [2009] 16 NWLR (Pt. 1166) 169
9. Nwanganga v. Government of Imo State [1987] 3 NWLR (Pt. 59) 185
10. Ogidi v Egba [1999] 10 NWLR (Pt. 62) 42 at 47

STATUTES

1. Constitution of the Federal Republic of Nigeria 1999 (as amended)
2. Economic and Financial Crimes Commission Act 2004
3. Evidence Act 2011
4. Federal High Court Act 2004

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Evelyn Okpo