

## THE DECISION IN GUARANTY TRUST BANK PLC V. MR. AKINSIKU ADEDAMOLA: A PRECARIOUS PRECEDENT FOR EXTRA-JUDICIAL POWERS OF EFCC TO PLACE RESTRICTIONS/FREEZING ORDER ON A BANK CUSTOMER'S ACCOUNT

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### Abstract

*The notable crimes which threaten global peace and security in recent times include terrorist financing, money laundering, bribery and other species of financial crimes. In Nigeria, the agency primarily responsible for tackling and curbing the menace of financial crimes is the Economic and Financial Crimes Commission (hereinafter referred to as 'Commission') and since financial crimes are mostly perpetuated through the use of Bank accounts, the Commission makes use of some extra-judicial tools in its modus operandi which involves giving directives to banks to place restrictions on bank customers' account pending when the Commission would obtain a court order. However, the recent decision of the Court of Appeal in Guaranty Trust Bank (GTB) Plc. v. Adedamola has dealt a big blow to the use of extra-judicial tools in curbing economic and financial crimes. Consequently, this paper aims to critically review the extra-judicial powers of the Commission to place restrictions on bank customers account vis-à-vis the decision of the court.*

### 1. Introduction

The last few years in the financial world has seen sharp increases in financial fraud as the speed at which financial crimes occur are always swift<sup>1</sup>. Usually, fraudsters take absolute control of the proceeds of such crimes within a short time due to the nature of financial crimes.<sup>2</sup> Also, it is cumbersome for financial institutions and law enforcement agencies to track the proceeds of fraud since it usually gets dissipated within a few hours, days or a week.<sup>3</sup> However, there has over the years been in existence, some extra-judicial tools utilized by banks and law enforcement agencies to temporarily freeze bank account reasonably

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<sup>1</sup> M. Krambia-Kapardis "Corporate Fraud and Corruption" (2016) available at <[https://link.springer.com/content/pdf/10.1057%2F9781137406439\\_2.pdf](https://link.springer.com/content/pdf/10.1057%2F9781137406439_2.pdf)> (last accessed 7 September 2020)

<sup>2</sup> Ibid

<sup>3</sup> Ibid

suspected of containing proceeds of crime. A letter sent by a private party or directive by an agency of government that provides a financial institution with sufficient particulars and evidence of fraud which outlines its legal obligations in the circumstances, can both entice the institution and/or law enforcement agents to take the necessary steps to thwart the fraudulent activity. As such, the notice/directive to banks serves as an effective asset preservation tool for victims of fraud.<sup>4</sup>

Furthermore, there have been amplified efforts, in recent times, in the actions of the Nigerian government to its fight against corruption and recovery of looted funds.<sup>5</sup> As such, the Commission has utilised as part of its modus operandi the practice of writing/directing banks to place restrictions on bank customers' account which are, in the opinion of the Commission, under investigations for receiving proceeds of crime.

Unsurprisingly, the directives by the Commission to banks have been met with much hue and cry, coupled with numerous court cases<sup>6</sup> instituted by bank customers who believed that the action of the Commission was illegal and that since banks and other financial institutions owe customers a duty of secrecy/confidence, details of and access to a customer's bank account and transactions must be kept private.<sup>7</sup> Thus, the decision of the Court of Appeal, Lagos Division in *GTB Plc v. Mr. Akinsiku Adedamola & Ors*<sup>8</sup> was greeted with much praise and jubilations particularly from many bank customers who felt that "cautions" placed by a bank on a customers' account via the directive of the Commission was unjustifiable and illegal.<sup>9</sup> Without mincing words, the Honourable Appellate Court held inter alia that: *"Before freezing customer's account or placing any form of restrain on any bank account, a bank must be*

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<sup>4</sup> For example, the commonly referred to, in the trade as the 'Mareva by Letter' (referred to by the Courts of England & Wales as a 'Freezing Order by Letter'). Basically, the 'Mareva by Letter' operates so as to set in train an immediate and informal (or de facto) freeze of any assets in respect of which a third party (being neither the guardian or nominal asset title holder) claims an interest.

<sup>5</sup> Available at <<https://www.premiumtimesng.com/news/top-news/405676-looted-funds-weve-recovered-over-n800-billion-lai-mohammed.htm>> (last accessed 7 September 2020)

<sup>6</sup> *Olagunju v. EFCC* (2019) LPELR – 48461 (CA)

<sup>7</sup> *Stephens Industries & Anor v. Bank of Credit & Commerce Int'l (Nig) Ltd* (1999) LPELR-901 (SC)

<sup>8</sup> [2019] 5 NWLR (Pt. 1664) 30

<sup>9</sup> Available at <<https://www.mondaq.com/nigeria/compliance/800268/post-no-debit-order-when-the-law-smiles-on-non-compliance-with-directives-of-law-enforcement>> (last accessed 7 September 2020).

*satisfied that there is an order of court*". The Honourable Appellate Court went on to hold that:

Where there is an allegation of commission of crime against a customer of a Bank in relation to the funds in his account, the Commission is empowered by law to set in motion the process of investigating any such funds perceived to be derived from proceeds of crime. In conducting the investigation, the commission is required to observe due process and satisfy the requirements of the law. The Commission or its officers must go to court and obtain an ex parte order before freezing the account; any failure to follow due process will render the action taken by the Commission a violation of the rights of the customer. (P. 41, paras. F-G)

A proper review of Nigerian laws and statutes cannot in our opinion support the general statements pronounced by the Honourable Appellate Court and the decision appears to relegate/annul the valid and legal circumstances under which the Commission may write to banks to place "caution", "stop order" or "restriction" on a customers' account without obtaining a court order. Thus, it is in the reasoned opinion of the writer that the jurisprudential basis for the existence and use of extra-judicial tools is to preserve proceeds of fraud before the Commission secures a court order. As such, this paper shall demonstrate that the extra-judicial tools are recognised in the corpus of our laws and that in its recognizance, some statutes have codified provisions and procedures empowering certain agencies of government to exercise such discretionary powers within the limits of the law.

In the light of the foregoing, this paper set for itself the task of reviewing the decisions of the Honourable Appellate Court in *GTB Plc. v. Mr. Akinsiku Adedamola & Ors.*<sup>10</sup> It is the writer's conclusion that the decision of the court solemnly adumbrates a setback to the jurisprudential basis, development and use of legal extra-judicial tools for placing restrictions on a bank customers' account by the requisite agencies of government in curbing financial crimes. Therefore, this paper offers suggestions on the proper or correct approach on the

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<sup>10</sup> Supra at note 6

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special powers of the Commission in relation to giving directives to banks to place restrictions on bank customers' accounts.

## **2. Facts of the Case**

The 1<sup>st</sup> Respondent (Mr. Akinsiku Adedamola) filed an application for enforcement of his fundamental rights against the Appellant (GTB Plc.), the 2<sup>nd</sup> Respondent (the Commission) and 3<sup>rd</sup> Respondent (Baba Muhammed Azari) at the Federal High Court, Lagos to challenge the freezing of his account numbers 0014455802 and 0014455819 by the Appellant based on the order of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents who alleged that a transfer was made into the 1<sup>st</sup> Respondent's account by one Akinshiku Roy suspected to be laundered money.

Furthermore, the 1<sup>st</sup> Respondent alleged that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were constantly intimidating, threatening and arresting him hence the decision to approach the court for the enforcement of his fundamental rights as enshrined and protected by section 44 of the 1999 Constitution of the Federal Republic of Nigeria (as amended). The 1<sup>st</sup> Respondent also sought for an order of perpetual injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents and prayed for the sum of N100,000,000.00 (One Hundred Million Naira) as compensation for illegal and unlawful freezing of his account. After considering the application of the 1<sup>st</sup> Respondent and all relevant processes filed by the parties, the trial court found in favour of the 1<sup>st</sup> Respondent and awarded damages for breach of his fundamental rights in the sum of N4,000,000.00 (Four Million Naira) for freezing the account of the 1<sup>st</sup> Respondent with the Appellant.

Dissatisfied with the judgment of the trial court, the Appellant appealed to the Court of Appeal and contended amongst others that the case of the 1<sup>st</sup> Respondent did not disclose breach of fundamental right because the 1<sup>st</sup> Respondent approached the court for an order to release his account having been frozen by the Appellant on the instruction of the 2<sup>nd</sup> Respondent.

## **3. Decisions of the Court in GTB Plc v. Adedamola<sup>11</sup>**

1. On whether the Commission (EFCC) can issue an instruction to banks to place restrictions on customer's account? The Court held that:

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<sup>11</sup> Supra, at note 8

Before freezing customer's account or placing any form of restraint on any bank account, a bank must be satisfied that there is an order of court. By the provisions of section 34(1) of the Economic and Financial Crimes Commission Act, 2004 the Economic and Financial Crimes Commission has no power to give direct instructions to Banks to freeze the account of a customer without an order of court, so doing constitutes a flagrant disregard and violation of the rights of a customer. (P. 43, paras. E-F)

2. On the proper procedure to follow in placing restrictions on customers' account where there is an allegation of crime? The Court held that:

Where there is an allegation of commission of crime against a customer of a bank in relation to the funds in his account, the Commission is empowered by law to set in motion the process of investigating any such funds perceived to be derived from proceeds of crime. In conducting the investigation, the Commission is required to observe due process and satisfy the requirements of the law. The Commission or its officers must go to court and obtain an ex parte order before freezing the account; any failure to follow due process will render the action taken by the Commission a violation of the rights of the customer. (P. 41, paras. F-G)

#### **4. Analysis**

The Economic and Financial Crimes Commission (Establishment) Act<sup>12</sup>, 2004 grants wide powers of investigation and prosecution of crimes to the Commission<sup>13</sup>, particularly, Section 6(a) - (q) of EFCC Act grants to the Commission powers of investigation of crimes relating to economic and financial crimes, money laundering, advance fee fraud, illegal charge transfer in addition to powers of examination of all reported cases of economic and financial crimes with a view to identifying individuals, corporate bodies or groups involved, while **Section 7(1) (a)** and (b) of the Act, empowers the Commission to cause investigation to be conducted as to whether any person, corporate body or

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<sup>12</sup> EFCC Act 2004

<sup>13</sup> See Sections 6 & 7 EFCC Act 2004.

organization has committed an offence under the Act or if it appears to the Commission that the person's life style and extent of the properties are not justified by his source of income.

However, the Commission was also made the coordinating agency for the enforcement of other similar provisions which includes the following;

- a) the Money Laundering Act,
- b) the Advance Fee Fraud and Other Related Offences Act,
- c) the Failed Banks (Recovery of Debt and Financial Malpractices in Banks) Act,
- d) the Banks and Other Financial Institutions Act,
- e) the Miscellaneous Offences Act; and
- f) any other law or regulation relating to economic and financial crimes, including the Criminal Code and Penal Code<sup>14</sup>.

From the foregoing, it is opined that having regard to the inclusive nature of the provisions in section 7(2) of the EFCC Act, it suffices to say that the investigatory powers of the Commission are as defined by the EFCC Act and all laws on economic and financial crimes which, though, not specifically mentioned in the Act, creates an offence which may be categorized as or in the nature of economic and financial crimes<sup>15</sup>.

Flowing from the preceding paragraphs, the Commission has wide investigatory mandates and powers under the omnibus provisions to enforce any other law or regulations relating to economic and financial crimes<sup>16</sup>. One of such laws is the provisions of the Money Laundering (Prohibition) Act, 2011 which makes comprehensive provisions to prohibit the financing of terrorism, the laundering of monies/proceeds of a crime, or an illegal act. An important provision to this paper is Section 6 of the Act<sup>17</sup> which makes provisions for special surveillance on certain transactions and grants the Commission powers to place a "stop order" not exceeding 72 hours, on any account or transaction if it is discovered in the

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<sup>14</sup> Sec 7(2) of the EFCC Act 2004

<sup>15</sup> A. Y. Mohammed: *A Compendium of the laws relating to Economic and Financial Crimes, Terrorism, Drug and Human Trafficking in Nigeria*, (vol 2, 2007, Benchmark law series) 23

<sup>16</sup> 7(2)

<sup>17</sup> Money Laundering (Prohibition) Act, 2011.

course of their duties that such account or transaction is suspected to be involved in any crime.

Consequent upon the above, it is the writer's reasoned opinion that the decision of the Court of Appeal, Lagos Division in *GTB Plc v. Mr. Akinsiku Adedamola & Ors* that: "Before freezing customer's account or placing any form of restraint on any bank account, a bank must be satisfied that there is an order of court" is a sweeping generalization which does not take into cognizance that there is a wide difference between freezing an account and placing restraints on an account.

A careful reading of the provisions of section 6 (5), (6), (7) & (8) of the Money Laundering (Prohibition) Act and Section 34(1) of the EFCC Act would reveal that there is a confounding difference between a "stop order" and a "freezing/block order" under our laws. A "stop order" is provided under section 6 (5) of the Money Laundering (Prohibition) Act to empower the Commission, financial institutions or designated non-financial institution to place restrictions on a bank customers' account without procuring a court order. The effect is that the Commission can write/direct a bank to place restriction or stop order on any account for maximum of 72 hours, without a court order. On the other hand, a freezing order under section 34 of EFCC Act is similar to a "block order" under section 6 (7) & (8) of the Money Laundering (Prohibition) Act, 2011 as both orders can only be made on such terms/ directions of the court. Section 6 (5), (6), (7) & (8) of the Money Laundering (Prohibition) Act makes the distinction crystal clear and understandable as it provides for both a "stop order" and "block order".

The above explanation is indispensable as the Honourable Appellate Court placed too much unnecessary emphasis on the need for the Commission to seek and obtain a court order before it could direct a bank (or other financial institutions) to place caution or restriction on any bank customers' account. It is the writer's opinion that it is only when the Commission seeks to freeze/block an account that it needs to comply with the provisions of section 34(1) of the EFCC Act or Section 6 (7) & (8) of the Money Laundering (Prohibition) Act.

It is the writer's further opinion that investigation of all financial crimes as contemplated under section 6 & 7 of the EFCC Act and Section 6 of the Money Laundering (Prohibition) Act gives the Commission the power to place

restriction on the account of a customer in the interim (for maximum of 72 hours) before proceeding to court by *ex parte* [on or from one party] to get an order of court in cases where the money in the account may be dissipated. Thus, the decision of the Court of Appeal, Lagos Division in *GTB Plc v. Mr. Akinsiku Adedamola & Ors*<sup>18</sup> missed a golden opportunity to clearly expatiate this clear provision of the law. It is our further submission that the decision was reached in narrow consideration of only the provision of Section 34 of the EFCC Act.

Assuming without conceding that the reasoning of the Honourable Appellate Court should be the intention of the legislators, without doubt, such position would be a big blow to the mischief which the EFCC Act was promulgated to cure. Without mincing words, the decision of the Honourable Appellate Court does not align with the aim, intention and objective of tackling economic and financial crimes.<sup>19</sup> It was the same court that held in *Obiwusi v. EFCC & ANOR*<sup>20</sup> that:

The powers of the 1<sup>st</sup> Respondent include the powers of the police and they are wide and cuts across several legislations promulgated to fight financial crimes. It is obvious that until a person is discharged formally or prosecuted by a court of competent jurisdiction, the 1<sup>st</sup> Respondent has the power to over and continue or reopen inconclusive investigations, and except if there is a decision of a court barring it from doing so, then 1<sup>st</sup> Respondent should be responsible enough to hands off.

Also, the Court of Appeal in *Dimnwobi & Anor v. EFCC & Anor*<sup>21</sup> held that: “No Court has the power to stop the investigative powers of the police or EFCC or any agency

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<sup>18</sup> Supra

<sup>19</sup> Supreme Court in *Ifezue v. Mbadugha & Anor* (1984) LPELR-1437(SC) stated that: “for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered (1) what was the common law before the making of the Act (2) what was the mischief and defect for which the common law did not provide (3) what remedy the parliament hath resolved and appointed to cure the disease of the common law (4) the true reason of the remedy; and then the office of all the Judges is always to make such constructions as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono public”

<sup>20</sup> (2018) LPELR-44536(CA).

<sup>21</sup> (2018) LPELR-46694(CA)



*established under our laws to investigate crime where there is reasonable suspicion of commission of crime or ample evidence of commission of an offence by a suspect”*

Thus, the power exercised by the Commission in directing banks to place restrictions on a bank customers’ account for a maximum of 72 hours, if it is discovered in the course of their duties that such account or transaction is suspected to be involved in any crime, is in furtherance of the investigative powers of the Commission.

To drive home this point, a similar power was given to the Governor of the Central Bank of Nigeria (CBN) under Section 1(1) of the Currency Conversion (Freezing Orders) Act<sup>22</sup> if in the process of converting any currency into the Nigerian currency, a fraud or irregularity of any form is committed, the Central Bank of Nigeria Governor, notwithstanding the fact that no application has been made to any court for the freezing of such account, can on his own make an order instructing the manager of a bank where such fraud was committed to stop any transaction relating to such account. Thus, such extra-judicial tools for temporarily placing restrictions on an account have strong jurisprudential basis and uses under our laws.

For purposes of comparative analysis and reference, the Ontario Superior Court of Justice recently revisited the circumstances in which a bank owes a duty to protect third-party victims of a fraud perpetrated by one of its own customers. The court confirmed the long-standing principle that “only proof of actual knowledge of the fraud (or proof of its moral equivalence in wilful blindness or recklessness) will suffice to require a bank to take steps to protect third parties from a fraud being perpetrated by its customer using accounts at the bank.”<sup>23</sup> Thus, the use of extra-judicial tools for placing restriction on customers account is a fact of universal eminence and necessity due to the nature of financial crimes. Pin-pointedly, the decision of the Honourable Appellate Court in *GTB v. Adedamola* does not appreciate the wide investigative powers of the Commission, the nature of economic and financial crimes and the mischief which the laws on financial crimes were enacted to curb. Consequently, the case under review is a dangerous precedent to the investigatory and interim powers of the Commission on accounts suspected to contain proceeds of crime.<sup>24</sup> It is the writer’s considered

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<sup>22</sup> Cap C55 Vol. 4 LFN 2010

<sup>23</sup> 1169822 *Ontario Limited v. The Toronto-Dominion Bank*, 2018 ONSC 1631 [TD]

<sup>24</sup> Section 6 & 7 of the EFCC Act empowers the Commission to conduct investigations.

opinion that the decision of the Court of Appeal under reference is not in line with international best practices where a third party could by a letter, request that an account is placed on hold for the purposes of investigation and to prevent dissipation of funds.

## **5. Conclusion**

In conclusion, this paper has revealed that the Commission possesses special extra-judicial powers to place restrictions on bank customers' account without a court order and that such powers enjoys long jurisprudential basis under our laws. Nevertheless, the Commission can only exercise such powers for maximum of 72 days. In the critically analysed case of *GTB v. Adedamola*, the court failed to expatiate on the difference between a "stop order" and "freezing/block order". However, this paper has helped in shedding more light on the apparent dichotomy in accordance with extant statutes.

By the provision of Section 6(6) of the Money Laundering (Prohibition) Act, the commission can direct financial institutions to place restrictions on a bank account without a court order being obtained for 72 hours (3 days). On the other hand, Section 34 of the EFCC Act requires that the Commission has to obtain an order from the court before freezing an account irrespective of whether it has been placed under an interim restriction or otherwise. It is therefore notable to state that the Commission possesses extra-judicial powers to place a stop order on bank customers' account, without a court order, if it is discovered in the course of their duties that such account or transaction is suspected to be involved in any crime.