

IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

HOLDEN AT ABUJA

THIS THURSDAY, THE 23RD DAY OF MARCH, 2023

BEFORE: HON. JUSTICE ABUBAKAR IDRIS KUTIGI – JUDGE

SUIT NO: CR/151/2020

MOTION NO:M/5159/2022

BETWEEN:

FEDERAL REPUBLIC OF NIGERIA.....COMPLAINANT/RESPONDENT

AND

- | | | |
|--|---|------------------------------------|
| 1. MOHAMMED BELLO ADOKE | } |DEFENDANTS/RESPONDENTS |
| 2. ALIYU ABUBAKAR | | |
| 3. RASKY GBINIGIE | | |
| 4. MALABU OIL AND GAS LIMITED | | |
| 5. NIGERIA AGIP EXPLORATION LIMITED | |DEFENDANT/APPLICANT |
| 6. SHELL NIGERIA ULTRA-DEEP LIMITED | } | ...DEFENDANTS/RESPONDENTS |
| 7. SHELL NIGERIA EXPLORATION
PRODUCTION COMPANY LIMITED | | |

RULING

By a motion on notice dated 26th October, 2022 and filed same date, the 5th Defendant/Applicant prays for the following Reliefs:

- 1. An order directing the Complainant/Respondent (“Respondent”) to furnish the Applicant with certified true copies of the following documents that are required for the conduct of the Applicant’s defence in the charge herein:**

- (a) Letter dated 24th August 2021, written by the Honourable Attorney General of the Federation (“HAGF”) to the Minister of State for Petroleum Resources in relation to the resolution of the issues connected with OPL 245**

- (b) Letter dated 15th September, 2017, written by the HAGF to the President of the Federal Republic of Nigeria in relation to the OPL 245 proceedings.**

- (c) Letter dated 20th September, 2017, written by the HAGF to the Acting Chairman of the Economic and Financial Crimes Commission (“EFCC”) with reference no DPPA/MPR/198/17 captioned “Re Forwarding of Case File in respect of Charge No: FCT/ABJ/CR/268: Malabu Oil and Gas Ltd”.**

- (d) Letter dated 27 September, 2017, written by the HAGF to the President of the Federal Republic of Nigeria captioned “Re Forwarding of Case File in respect of Charge No: FHC/ABJ/CR/268: Malabu Oil and Gas Ltd” and**

- (e) Letter dated 13th December, 2017, written by the Honourable Minister of State for Petroleum Resources to the Chief of Staff to the President of the Federal Republic of Nigeria with reference No: MPR/STAHMS/S.26/11.**

- 2. And for such further of other order(s) as this Honourable Court may deem fit to make in the circumstances.**

The grounds on which the application is made are as follows:

- 1. The Applicant and six others are currently defending the charge filed against them by the Respondent before this Honourable Court.**

- 2. The Respondent has so far led 4 (four) witnesses in evidence and the matter is scheduled for continuation of hearing on 21st and 22nd November, 2022.**

- 3. As part of the facilities required for the defence of the charge, the Applicant requires certified true copies of certain identified documents which are in the custody of the Respondent and/or its Ministries including the Federal Ministry of Justice, superintended by the HAGF, upon whose directions the Respondent acts in these proceedings and the Ministry of Petroleum Resources.**
- 4. By a letter dated 28th July, 2022, the Applicant had through one of the firms representing it, J-K Gadzama LLP, requested for certified copies of documents in the HAGF's custody to wit: the letter dated 3rd March, 2022 from Paul Erokoro, SAN & Co to the AGF and the letter dated 24th August, 2021 from the HAGF to the Honourable Minister of State, Petroleum Resources.**
- 5. By his response dated 24th August, 2022, the HAGF provided a certified true copy of Paul Erokoro, SAN & Co's letter but declined to provide the certified true copy of the HAGF's letter dated 24th August 2021 on the ground that it is a subject of administrative/criminal investigations.**
- 6. By a subsequent letter dated 21st September, 2022 to the HAGF, the Applicant through the firm of J-K Gadzama LLP requested for certified true copies of additional documents to wit: letter dated 15th September 2017 from HAGF to the President of the Federal Republic of Nigeria in relation to OPL 245 proceedings, letter dated 20th September, 2017 from HAGF to EFCC titled RE: FORWARDING OF CASE FILE IN RESPECT OF CHARGE NO: FHC/ABJ/CR/268: MALABU OIL AND GAS LTD" and letter dated 27th September, 2017, written by the HAGF to the President of the Federal Republic of Nigeria with reference number "DPPA/FMPR/198/17.**
- 7. The certified true copy of Paul Erokoro, SAN & Co's letter (already received), as well as the other documents listed in the reliefs are essential facilities for the Applicant's defence and therefore relevant.**

8. **By Section 36(6)(b) of the Constitution of the Federal Republic of Nigeria, 1999 every person charged with a criminal offence shall be entitled to be given adequate time and facilities for the preparation of his defence which include documents in the custody of the prosecution or the State (the Respondent) as in this case.**
9. **The Respondent has failed to furnished the Applicant with the requested documents which are relevant and part of the facilities for the defence in this trial.**
10. **An order of this Honourable Court is thus required to direct the Respondent to furnish the Applicant with the requested documents.**
11. **This Honourable Court is empowered to grant the reliefs sought in the instant application.**

The application is supported by a 4 paragraphs affidavit with 4 annexures marked as **Exhibits NAE1-NAE 4** and a written address.

In the address, one issue was raised as arising for determination as follows:

“Having regard to the right of every person who is charged with a criminal offence to be given adequate time and facilities for the preparation of his defence under section 36(6)(b) of the 1999 Constitution, should the Complainant/Respondent be directed to provide to the Applicant, certified true copies of the documents required for its defense, that are in the custody and/or under the control of the Complainant/Respondent?”

The submissions on this issue forms part of the Record of Court. I will only highlight the essence of the submissions as made out in the address. The crux of the address is to secure the order of court towards ensuring that the Applicant is afforded certain materials to enable a proper defence of the charge Applicant is facing. It was contended that **Section 36(6)b of the Constitution** guarantees the right of every person charged with a criminal offence to adequate time and facilities for the preparation of his defence and that once he makes a request for such facilities, that the court should accede to such request and that the prosecution

has to comply. The cases of **Ogbangwor V. States (2021)LPELR-55859**, **Okoye V. C.O.P (2015)LPELR-24675(SC)** were cited in support.

The Applicant contends that the documents sought are relevant for purposes of its defence and that where it is denied access to the documents, the Applicant would not have been deemed to have been given a fair trial in the circumstances.

The Applicant also contends that all the documents required are public documents within the purview of **Section 102 of the Evidence Act** and can also only be tendered in evidence within the legal parameters as provided for under the Evidence Act. It was thus submitted that in the circumstances, an order of court to make the Respondent produce certified true copies will be necessary to allow for the documents to be admissible in evidence.

In response, the **Complainant/Respondent** filed a 7 paragraphs counter-affidavit with a written address in which one issue was raised as arising for determination:

“Whether or not the 5th Defendant has placed sufficient material before the court showing that the documents being asked for are in custody of the Complainant/Respondent to enable this Honourable Court exercise its powers and discretion in its favour as prayed?”

The submissions made on the above issue equally forms part of the Record of Court. I shall equally here highlight the essence of the address. The crux of the case as made out in the counter-affidavit and the address is that the five documents asked for by Applicant are not in the custody or possession of EFCC except the letter by the HAGF to the Acting Chairman EFCC dated 20th September, 2017. That the four other documents are communications either between the office of the HAGF with the presidency or the Minister of State Petroleum Resources or between the Minister of State Petroleum Resources and the HAGF and or with the presidency and the Chief of Staff to the President and that these documents were not copied or sent to the EFCC to allow for an order that they furnish same.

The Respondent also contended that the case of **Okoye V. C.O.P (supra)** relied on by Applicant on the application of **Section 36 of the Constitution** is distinguishable from the facts of the extant case in that in **Okoye**, the request made was in respect of statements, documents and reports generated by investigations in

the course of investigating the case giving rise to the charge. That in this case, it is about communications exchange outside the purview of investigations in this case.

That the right to fair hearing is not only for the Applicant but all parties in this case and that it will be unfair to order EFCC to produce a document it neither authored nor received. That in this case, there is no evidence to support that EFCC has any of these documents and accordingly that the court should not grant the application.

The Applicant then filed a Reply affidavit of 4 paragraphs to the counter-affidavit of Respondent with one annexure and a Reply on points of law which essentially sought to accentuate the points earlier made and which equally forms part of the Record of Court. I will again simply only highlight the key points made in the Reply.

It was contended that the Respondent in this case is not the EFCC but the Federal Republic of Nigeria that filed the extant charge and that it has access to all the documents. That the case here is not between EFCC and the parties charged and also that the application is not directed at EFCC but for the Respondent (FRN) to produce the documents sought in its possession or through its agencies i.e the EFCC, HAGF and the Honourable Minister of State, Petroleum.

It was also contended that the EFCC is merely an Agency of the Federal Government and empowered to prosecute or institute criminal actions on its behalf. The case of **Akubo V. EFCC & Anor (2019)LPELR-47821(CA)** was cited.

Accordingly the Applicant submits that since EFCC is tasked with the prosecution on behalf of the Federal Government, it behoves on EFCC, being the Prosecutor to the Respondent, the FRN to provide the documents as the documents formed the basis for the prosecution. That the Respondent is essentially acting in bad faith in refusing to provide the documents sought by Applicant.

At the hearing, counsel on either side relied on the processes filed and adopted the submissions in the written address in urging the court to grant the application and on the other side of the aisle, to refuse to grant the application.

I have carefully considered the processes filed and the submissions made and the narrow issue is simply whether the court should grant the application directing the Respondent to furnish certified true copies of certain documents identified or streamlined on the motion paper to the Applicant.

It is stating the obvious that the right to every person charged with an offence to a fair hearing is guaranteed by **Section 36(4) of the Constitution of the Federal Republic of Nigeria (as Amended)**. An integral part of this, is the right of every person charged with an offence to be given adequate time and facilities for the preparation of his defence to the criminal charge. The whole purpose of this application is for the Respondent to produce certain materials in accordance with the provisions of **Section 36(6)(b) and (d) of the Constitution**.

In **Nweke V. State (2017)LPELR-42103(SC)**, the Supreme Court defined the term “**facilities**” used in **Section 36(6)(b) of the Constitution** to mean “**resources**” or “**anything**” which could aid the accused person in preparing his defence to the crimes for which he is charged.

Indeed in the said case, the Apex Court made it clear that where an accused person wants some facilities which were not made available to him by the prosecution, a mere request from the accused to the prosecution will not suffice because the prosecution is not obliged to accede to the request of the accused. The accused must formally apply to the court for the facilities which he requires for his defence and which the court will consider and make the necessary order(s).

Again the Apex Court in the said decision stated that though the Defendant or accused has a right to reasonable time and facilities to prepare his defence, that right is not self executory or an absolute right but one which judicial intervention is required to achieve as the exercise of such right may need to be weighed by the court against competing interest such as national security and the need to protect witnesses at risk of reprisal among other compelling considerations.

Now in this case, the Applicant has identified the documents or facilities required and even further identified parties or entities it contends possess the documents. Let us take our bearing from the affidavits filed on both sides as follows:

- “
3. **I was informed by Sunday Agaji, Esq., one of the counsel handling this matter in our firm, at our aforementioned office address on 14 October, 2022 at about 2:00pm during the review of the matter and I verily believe to be true as follows: ...**

- c. As part of facilities required for defence of the charge, the Applicant requires certified true copies of the documents listed below, which are in the custody of the Respondent and/or its Ministries including the Federal Ministry of Justice superintended by the Minister of Justice and Honourable Attorney General of the Federation (“HAGF”), upon whose directions the Respondent acts in these proceedings:**
- i. Letter dated 24 August 2021 written by the HAGF to the Honourable Minister of State, Petroleum Resources in relation to the resolution of the issues connected with OPL 245**
 - ii. Letter dated 15 September, 2017 written by the HAGF to the President of the Federal Republic of Nigeria whereby the AGF advised that the investigation conducted by the Economic and Financial Crimes Commission (“EFCC”) did not reveal a case of fraud and that the Block 245 Resolution Agreement dated 29 April, 2011 between the complainant/Respondent, 5th-7th Defendants and the Nigerian National Petroleum Corporation (“Resolution Agreement”) was entered into with the approval of 3(three) consecutive past Presidents of Nigeria.**
 - iii. Letter dated 20 September, 2017 written by the HAGF to the Acting Chairman of the EFCC with reference No: DPPA/FMPR/198/17 whereby the AGF advised that EFCC’s investigation did not reveal a case of fraud against the Defendants in respect of the Resolution Agreement; and**
 - iv. Letter dated 27 September, 2017, written by the HAGF to the president of the Federal Republic of Nigeria captioned “Re: Forwarding of Case File in respect of Charge No: FHC/ABJ/CR/268: Malabu Oil and Gas Ltd.”**
- d. The Applicant also requires a certified true copy of the letter dated 13 December, 2017 with reference No: MPR/STAHMS/S.26/11 written by the former Honourable Minister of State, Petroleum Resources to the Chief of staff to the President of the Federal Republic of Nigeria.**

- g. The letter dated 20 September, 2017 with reference No: DPPA/FMPR/198/17 and 27 September, 2017, referred to in paragraph 3(iii) and (iv) above, emanated from the office of the HAGF and is also in the custody of the EFCC to whom it was sent.**
- h. The letter dated 13th December, 2017 from the former Minister of State, Petroleum Resources, Dr. Emmanuel Ibe Kachikwu to the Chief of Staff to the President, referred to in paragraphs 3(d) & (e) above, are in the custody of EFCC and HAGF both of whom the letter was copied to.**
- i. He knows that on 28 July, 2022, the Applicant wrote to the HAGF via one of the firms representing it, J-K Gadzama LLP, to request for certified copies documents in the HAGF's custody to wit; the letter by Paul Erokoro, SAN & Co to the HAGF dated 3rd March, 2022 and the HAGF's letter to the Minister of State, Petroleum Resources dated 24th August, 2021.**
- m. He knows that the documents are essential for the Applicant to show that the Resolution Agreement which is one of the key documents to be evaluated in the course of these proceedings was entered into in furtherance of the lawful directives/approval of the then President of the Federal Republic of Nigeria in the exercise of his executive powers. The criminal allegations against the Applicant in this charge are directly related to the Resolution Agreement.**
- n. He is aware that the said documents are in possession of the Respondent, the EFCC, the Honourable Attorney General of the Federation and the Honourable Minister of State, Petroleum Resources as the case maybe."**

The Respondent in its counter-affidavit stated in response to the above as follows:

"That I have been informed by Mr. Offem I. Uket, the prosecuting counsel to the Complainant/Respondent on 11th November, 2022 in his office at No.5 Fomella Street, Wuse II Abuja at about 10:22 hours and I verily believe him to be true and correct as follows:

- (i) That contrary to paragraph 3(c) (i), (ii), (iv), (d) and (h) of the 5th Defendant/Applicant's affidavit in support, he knows as a fact that the EFCC which is the prosecuting agency is not known to be a part of the Presidency, Ministries of Justice and or Ministry Petroleum Resources, neither is it in custody nor in possession of the said letters that were neither addressed to nor copied to it as to have custody or possession of them.**
- (ii) That contrary to paragraph 3(c) (i) of the 5th Defendant/Applicant's affidavit in support, he knows as a fact that the EFCC does not have the custody or possession of the letter dated 24th August, 2021 allegedly written by the Honourable Attorney-General of the Federation (HAGF) to the Honourable Minister of State, Petroleum Resources HNSPR) when the said letter has not been copied to the EFCC.**
- (iii) That contrary to paragraph 3(c) (ii) of the 5th Defendant/Applicant's affidavit in support, he knows as a fact that the EFCC does not have the custody or possession of the letter dated 15th September, 2017 allegedly written by the Honourable Attorney-General of the Federation (HAGF) to the President of the Federal Republic of Nigeria that was neither addressed to nor copied to it to have custody or possession of it.**
- (iv) That in response to paragraphs 3(c) (iii) and 3(g) of the 5th Defendant's affidavit in support in regard to the letter dated 20th September, 2017 with reference No: DPPA/FMPR/198/17 by the HAGF to the Acting Chairman, EFCC, he knows as a fact that the 5th Defendant/Applicant is not a Defendant in Charge No: FHC/ABJ/CR/268/2016 between F.R.N Vs Malabu Oil and Gas Limited & 7 Ors pending at Court 5 of the Federal High Court Abuja Division.**
- (v) Further to paragraph 5(iv) above, he knows as a fact that the letter is in EFCC's custody, and is also aware that the HAGF in the said letter also admonished the EFCC to thoroughly investigate the case in order to enhance its diligent prosecution; the EFCC had since done that and the HAGF has not advised the EFCC to withdraw the charge.**

- (vi) That contrary to paragraph 3(c) (iv) of the 5th Defendant/Applicant's affidavit in support, he knows as a fact that the EFCC does not have the custody or possession of the letter dated 27th September, 2017 allegedly written by the Honourable Attorney-General of the Federation (HAGF) to the President of the Federal Republic of Nigeria captioned "Forwarding of Case File in respect of Charge No: FHC/ABJ/CR/268 between F.R.N V. Malabu Oil and Gas Ltd & 7 Ors, the said letter was neither addressed to nor copied to it as to have custody or possession of it.**
- (vii) That contrary to paragraph 3(d) and (h) of the 5th Defendant/Applicant's affidavit in support in respect of the letter by the former Minister of State, Petroleum Resources to the Chief of Staff to the President, Federal Republic of Nigeria dated 13th December, 2017, he knows as a fact that the said letter was neither addressed to nor copied to the EFCC and the EFCC has no custody or possession of it.**
- (viii) That the letter written by the former Minister of State, Petroleum Resources having neither been addressed to nor copied to the EFCC, the Complainant/Respondent is not in a position to deny or admit whether the former Minister aligned himself with the HAGF.**
- (ix) That contrary to paragraph 3(l) and (m) of the affidavit in support, he is not in a position to know how essential the letter by Mr. Paul Erokoro SAN is to the 5th Defendant for his defence and further deny having possession or custody of the said documents.**
- (x) That he knows as a fact that of all the documents being asked for, the only document in the custody of the EFCC is the letter dated 20th September, 2017 with reference No: DPPA/FMPR/198/17 by the HAGF to the Acting Chairman, EFCC; that he believes the 5th Defendant is on a fishing expedition regarding the other documents when he knows the EFCC have no custody of the said documents.**

6. That it will not be in the interest of justice to grant this application when it has become obvious that the EFCC which is the prosecuting agency has no possession or custody of the said documents”

The relative position of parties with respect to the documents sought are clear. The prosecution situates that **four** out of the documents sought clearly are not in their possession. The Applicant however contends otherwise and this then raises the question of the legal limits, if any, to the demand for facilities and resources to prepare a defence and what the law enforcement or prosecuting authority can conceivably respond to.

I had earlier stated the position of the Apex Court which characterised the right as not one defined in absolute terms. The right as I understand it must thus be circumscribed within proper limits and in the context of the facts and merits of each case and not stretched to cover every conceivable scenario.

Now in this case, it is true that the complainant is the **F.R.N.** It is however equally not in dispute that EFCC is an agency of the Federal Government empowered by law to institute and prosecute criminal actions and it filed the extant charge on behalf of the Federal Government. It is logical to say that in exercising its power(s), it can only do so in the context of or within the purview of the same enabling provisions of the EFCC Act and extant applicable laws. I have, in particular, carefully considered the EFCC Act and there is nothing in the Act and I have not been referred to any of its provisions where it has or exercises any special powers over agencies of the Federal Government in the discharge of this prosecutorial mandate.

In filing the extant charge, the EFCC was duty bound to comply with provisions of **Section 379 (1) (a) of ACJA** which provides as follows:

“379 (1) An information shall be filed in the registry of the High Court before which the prosecution seeks to prosecute the offence, and shall include:

- a. the proof of evidence, consisting of:**
 - i. the list of witnesses,**
 - ii. the list of exhibits to be tendered,**
 - iii. summary of statements of the witnesses,**

- iv. **copies of statement of the defendant,**
- v. **any other document, report, or material that the prosecution intends to use in support of its case at the trial,**
- vi. **particulars of bail or any recognizance, bond or cash deposit, if defendant is on bail,**
- vii. **particulars of place of custody, where the defendant is in custody,**
- viii. **particulars of any plea bargain arranged with the defendant;**
- ix. **particulars of any previous interlocutory proceedings, including remand proceedings, in respect of the charge, and**
- x. **any other relevant document as may be directed by the court;”**

The above provision for me is clear and unambiguous. What would form part of the proof of evidence are clearly indicated. The word used therein is “shall” which is a clear word of command and there appears to be no discretion to be exercised on the matter.

Properly appreciated, the proof of evidence essentially provides the defendant fair notice of the case and all the exhibits, documents, report and relevant material that the prosecution will be presenting at trial, which then enables the defendant to prepare his defence. The above provision indeed and in some detail has precisely and expansively defined and situated what should be given to the defendant. The provision for me is sufficiently broad to encompass the necessary facilities the prosecution would use to support its case and which it is, as a legal imperative, obliged to give to the defendant.

The position is strengthened further by the provision of **Section 379 (3) of ACJA** which provides thus:

“(3) The information and all accompanying process shall be served on the defendant or his legal representative, if any.”

There is here absolutely no specific complaint(s) by Applicant situated within the purview of the above provisions. The logical implication is that the prosecution has essentially complied with the terms and afforded Applicant with the materials it will utilise at trial.

The documents now sought by Applicant clearly do not form part of the documents streamlined for use by the prosecution in proof of the allegations against defendants, including Applicant.

In the context of this provision and in relation to the extant charge, a person facing a criminal charge must have the time, facilities and resources to prepare a defence. This right in my opinion exists at all stages of the prosecution and encompasses the right to documents, files and information gathered by the law enforcement authorities to be urged as evidence against a person. A Defendant need to have an opportunity to see and review evidence that may be used against it. That for me is the *raison d'etre* behind the provision of **Section 379 of ACJA**. In such situations, the court will not be in any difficulty in granting the request for access to relevant documents streamlined to be used at the trial by the prosecution. Indeed the law is clear that where such documents are identified by the prosecution and a demand is made where not originally furnished, they are duty bound to produce it failing which it will not be available to be used by the Prosecution except by consent of the other party or the order of court. See **Section 245 of the Evidence Act 2011**.

In this case and as already alluded to, the **documents** sought by Applicant do not form part of the documents or facilities which the prosecution intends to use for the purpose of the prosecution of the case at trial. It therefore ordinarily do not form part of the documents or the proof of evidence to be availed the defence. The logic and dynamics must thus change in my considered opinion, in such a situation: Documents, materials, information generated by investigations in the context of a charge will be **available to a defence** but this must be treated as distinct from documents outside the purview of the investigations relating to a particular charge; documents as in this case which the prosecution do not know about and which they are not using at trial. I am not sure that they can be compelled to produce, and I say this with care, documents in this specific category.

In this case, **four** of the documents sought by Applicant at the risk sounding prolix, are as streamlined in the affidavit in support as follows:

1. Letter dated 24th August, 2021 written by the HAGF to the Honourable Minister of State Petroleum (par3c(i)).

2. Letter dated 15th September, 2017 written of the HAGF to the President of the FRN (par 3c(ii))
3. Letter dated 27th September, 2017 written by the HAGF to the President FRN (par 3c(iv))
4. Letter dated 13th December, 2017 written by Hon. Minister of State Petroleum to the Chief of Staff (par 3d).

It is clear that these are **correspondences** not involving the EFCC. It was neither authorized by them or copied to them except the letter covered by no(4) above. These are not documents therefore in the nature of, for example, statements of witnesses or police investigation reports relating to the case. In such circumstances, it is difficult to rationalise the logic of compelling an agency like EFCC to produce the documents of the class identified above; documents it essentially knows nothing of to the clear extent that it featured no where in the proof of evidence.

The Federal Government may be the complainant but the prosecutorial body here is the EFCC even if admittedly it is also an agency of the Federal Government. The argument that it is the Federal Government that is the complainant and so EFCC should be in a position to get the documents needed is one I must admit I find superficially pleasing or persuasive but this argument loses traction when it is noted that EFCC is a creation of the law with clear deleanated powers and mandate under the EFCC Act and has no supervisory control over other agencies of Government. The EFCC cannot certainly be equated with the complainant. It remains only an Agency of the Federal Government in that clear capacity as a prosecuting Agency with a clear remit or mandate. No more. It is certainly not part of the presidency, the Ministry of Justice, the Ministry of Petroleum Resource or the Office of the Chief of Staff of the Presidency. It equally is in no position to know for example whether matters of National Security are involved in respect of any of the documents and the court must be circumspect. In that respect, I incline to the view that this application, with respect, loses sight of critical and impacting provisions of the law and the constitution. **Section 191 of the Evidence Act**, for example provides that:

“No public officer shall be compelled to disclose communications made to him in official confidence, when he considers that the public interests would suffer by the disclosure: Provided that the public officer concerned shall on the order of the court, disclose to the judge alone in chambers the substance of the communication in question and if the judge is satisfied that the communication should be received in evidence this shall be done in private in accordance with Section 36(4) of the Constitution.”

The above provision is clear.

The court may in the context of the above provision exercise oversight responsibilities and determine the sensitivity of such evidence, but in doing so, the court must hear from the custodian of such official document or information. The EFCC as the prosecuting agency, is limited, in this respect since the documents sought are not from them or in their custody. **Section 36(4)b of the 1999 Constitution** underscores the above position in the following terms:

“If in any proceedings before a court or such a tribunal, a Minister of the Government of the Federation or a Commissioner of the Government of a State satisfies the court or tribunal that it would not be in the public interest for any matter to be publicly disclosed, the court or tribunal shall make arrangements for evidence relating to that matter to be heard in private and shall take such other action as may be necessary or expedient to prevent the disclosure of the matter.”

This provision in my view equally situates clearly that the order for production of documents cannot be made at large. A party cannot be ordered to produce documents not in his possession or power. Where issues of national security and public interests may be involved, then care as stated earlier must be taken in such circumstances. Indeed reading different provisions of the Evidence Act projects the position that any order for production of documents must logically target the person or body in power or possession of such document(s). **Section 242(1) of the Evidence Act 2011** provides as follows:

“Subject to Section 243 of this Act, a witness summoned to produce a document shall, if it is in his possession or power, bring it to court, notwithstanding any objection which there may be to its production or to its

admissibility and the validity of any such objection shall be decided by the Court.”

Section 243(1) then provides thus:

“A Minister, or in respect of matters to which the executive authority of a state extends, the Governor or any person nominated by him, may in any proceedings object to the production of documents or request the exclusion of oral evidence when after consideration he is satisfied that the production of such document or the giving of such oral evidence is against public interest.”

The above provision again mentions “public interest” to again in my opinion emphasise the point that the order for production cannot be at large and should be to the person or body in possession.

The right to a fair trial is obviously fundamental under over Criminal jurisprudence but it is a right that must not be stretched beyond acceptable limits. The right to all facilities to aid in the defence of the charge cannot and must not extend to all materials the defence conceives it needs for the defence to the extent that the material(s) cannot be situated within the purview or confines of the investigation related to the charge and most importantly, the proof of evidence filed. The defence must also do its bit in defence; be creative and get the documents required as allowed under extant legislations. After all, the provision of **Section 218 of the Evidence Act** also makes it clear as follows:

“Any person, whether a party or not, in a cause may be summoned to produce a document without being summoned to give evidence, and if he causes such document to be produced in court the court may dispense with his personal attendance.”

The above again is clear and self explanatory.

The EFCC, however much as I have sought to be persuaded, cannot realistically be compelled to produce documents, the Applicant has not shown it has any link with or is in their possession. I agree that there should be a fair balance between the state and the accused. All what this means is simply that anyone accused of a crime must be accorded sufficient resources, time and facilities to put forward their defence. No more. The defence cannot however place an added burden on the prosecution to produce every material or facility it conceives it needs or requires

and from any quarters. The court must be wary of granting or making orders in patently fluid and unclear parameters as presented by the applicant; after all the burden to prove the elements of the charge beyond reasonable doubt remains sacrosanct and on the prosecution and never shifts.

In the context of the dynamics and clear facts of this case, the contention that Applicant is invoking its constitutional right to fair trial under **Section 36(6) of the Constitution** does not, I am afraid fly. I am not sure that the invocation of the provision of **Section 36(6)** can be at large. The materials sought by Applicant are not materials obtained by complainant in the process of investigation of the crime and gathering of evidence subject of the extant charge. If it was, it would have been relevant and material to the case and a demand made for same would have been plausible and availing. The documents here are essentially documents the Applicant wants and it must creatively use the plenitude of powers under extant laws to obtain same. I leave it at that.

On the whole, except for the document copied to EFCC, and that which they concede is in their possession, which the court will order that they be made available to the Applicant, the application in substance will not be availing.

For the avoidance of doubt, I hereby make the following order:

The EFCC is Ordered to furnish to the Applicant forthwith copies of the documents covered by Relief (c) which EFCC concedes, is in their possession and that covered by Relief (e) which was copied to the EFCC.

Hon. Justice A.I. Kutigi

Appearance:

- 1. Uffem I. Uket, Esq. with Obassey Oko for the Prosecution/Respondent.*
- 2. C. Ikuazom SAN for the 5th Defendant/Applicant with Francis Orosonye, Esq., Iyene Roberts, Sarah Atumga, Gbenga Ogundele, Gladys and Amanda Napital Buntai.*

3. E.I. Ekpe for the 1st Defendant/Respondent.

4. Hillary Ojeke and Oluwatoyin Ihinmika for the 6th and 7th Defendants/Respondents.