Judicial Powers in the Recovery and Management of Proceeds Financial Crimes

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Money Laundering is the practice of disguising illegally obtained funds so that they seem legal. It is a crime in many jurisdictions with varying depictions. It is a key operation of the underground economy.

In 1994, the UN estimated (conservatively) that up to US$500 billion was laundered per year in the industrialized world. Others put the estimate considerably higher, suggesting that money laundering may be the world's third largest business after foreign exchange transactions and the international oil trade.

Factually drug-related, the concept of money laundering has now expanded to deal with the proceeds of serious crime and crimes that generate serious proceeds. Further, as regulation of certain areas has become more effective, money launderers have been pushed to act in areas of lesser regulations.

In Ghana, the Anti-Money Laundering Act, 2008, Act 749 51 (1) states:

> ***A person commits an offence of money laundering if the person knows or ought to have known that property is or forms part of the proceeds of unlawful activity and the person***
> ***converts, conceals, disguises, or transfers the property,***
> ***conceals or disguises the unlawful origin of the property, or***
> ***acquires, uses or takes possession of the property.***

Case law during the past ten (10) years shows that draconian legal standards have been upheld by the UK Courts in determining money laundering cases. The

Courts have held that drug dealers can be deprived of their assets until they have diverged all that which had accrued to them in the drug trade.

In one case, R v Smith, 2001 Appeal Cases, the Court took a similarly hard-line approach to the defendant who has a confiscation order made against him after smuggling cigarettes past a custom post, only to be caught and deprived of his assets. The House of Lords held that, "***if in same circumstances (the confiscation scheme) can operate in a period or even a draconian manner, then that may not be out of place in a scheme for stripping criminals of the benefit of their crimes"***.

Measuring the scale of money laundering worldwide is difficult but the IMF estimates the global value to be between US$600 trillion and 1.8 billion a year. The lowest estimate of US$1.8 trillion is roughly equivalent to the GDP of Canada, the 9th largest economy in the world. It is estimated that in Zaire now DR Congo, former President Mobutu Sese Seko stole more than US$10 billion while the country's GDP is around US$5.3 trillion. In other words, Mobutu stole nearly twice the country's annual income.

Sani Abacha of Nigeria laundered US$6 billion and only US$1 billion had so far been blocked as at April 16, 2002. There was the need for all these looted funds to be recovered to the nations. These involve the use of the Courts to recover and manage these funds that had been transferred to the countries.

The issue of money laundering is grievous. It cannot be right to say only corrupt politicians or government officials are involved. Drug traffickers, women and children trafficking syndicates are equally guilty as well as other persons involved in illegal trade.

There is therefore the need for stiffer regulations and case law to curb this canker which is fast eating into the very fabric of society.

In the US Law, it is the practice of engaging in financial transactions to conceal the identity, source, or destination of illegally gained money. In UK Law the common law definition is wider. The act is defined as taking any action with property of any form which is either wholly or in part the proceeds of a crime that will disguise the fact that that property is the proceeds of a crime or obscure the beneficial ownership of said property.

In the post World War II era, legislators found themselves in a quandary as they were confronted with a growing list of commercial, fiscal, and environmental offences that did not actually cause direct harm to any one identifiable victim; there was no stinking corpse. What legal instrument could these legislators use to punish these criminals and discharge similar crimes in the future? Since human greed and the profit motive fuel organized crime, they decided that confiscating the proceeds of crime would adequately deter potential criminals.

Anxious to avoid confiscation, organized criminals now needed to give these huge sums of money - not easily consumed or invested in the legal economy without raising eyebrows – a patina of legitimacy they needed to "launder" it.

Money obtained by an illegal action is not of itself, laundered money. The laundering offence comes from the attempt to conceal its source, not because the transaction was

itself illegal (which is a separate offence).

The Supreme Court of the United States on June 2, 2008, rendered two judgments in favor of defendants, narrowing the application of the federal money – laundering statute.

In a unanimous opinion written by Justice Clarence Thomas, the Court reversed Acuna, Mexico's Humberto Cuellar's conviction and ruled that "hiding $81,000 in cash under the floor board of a car driving toward Mexico is not enough to prove the driver was guilty of money laundering; instead, prosecutors must also prove the driver was travelling to Mexico for the purpose of hiding the true source of the funds" that is, the prosecution had not made its prima facie case. The Court further ruled that "federal prosecutors have gone too far in their use of money laundering charges to combat drug traffickers and organized crime, that money laundering charges under the Money Laundering Control Act of 198, Sec. 18 USC § 1956 (a)(2)(B)(1) apply only to profits of an illegal gambling ring and cannot be used when the only evidence of a possible crime is when a courier headed to Texas – Mexico border with $81,000 in cash proceeds of a marijuana transaction; it cannot be proven merely by showing that the funds were concealed in a secret compartment of a Volkswagen Beetle; instead, prosecutors must show that the purpose of transporting funds in a money laundering case was to conceal their ownership, source or control; the secrecy must be part of a larger design to disguise the source or nature of the money".

Later in a divided decision, the Court reversed the convictions of Efrain Santos of Indiana and Benedicto Diaz for money laundering based on cash from an illegal lottery.

In the plurality opinion, Justice Antonin Scalia wrote that the law referred to the "proceeds of some form of unlawful activity; paying off gambling winners and compensating employees who collect the bets don't qualify as money laundering; the word "proceeds" in the federal money – laundering statute, 18 U.S.C § 1956, and §1956 (a)(1)(A)(1) and §1956 (h), applies only to transactions involving criminal profits, not criminal receipts; those are expenses, and prosecutors must show that profits were used to promote the illegal activity".

Congress clarified the meaning of the statute in the Fraud Enforcement and Recovery Act of 2009, defining "proceeds" explicitly to include both profits and gross receipts.

In Ghana, the High Court and Circuit Court have jurisdiction to try an offence under the Anti-Money Laundering Act 2003, Act 749. Section 46 of the Act 749 provides:

> ***"46 (2) In a trial for an offence under this Act, the accused person may be presumed to have unlawfully obtained pecuniary resources or property in the absence of evidence to the contrary if the accused person***
> ***is in possession of pecuniary resources or a property for which the accused cannot account and which is disproportionate to the accused person's known resources of income, or***
> ***had at the time of the illegal offence obtained access to persons pecuniary resources or property for which the accused cannot satisfactorily account".***

The Chief Executive Officer of the Financial Intelligence Centre (FIC) does not have the mandate to investigate serious offences. But where he/she is of the opinion that it is necessary to freeze a transaction, he/she will so do.

The Chief Executive, however shall apply to the Court, after seven days of freezing a transaction for a confirmation of his/her actions. The Court may confirm the freezing on conditions or direct the defreezing of the said transaction.

Section 47 of Act 749 which gives the Chief Executive Officer these powers mandates that, the Chief Executive Officer within forty-eight (48) hours notifies the person whose account had been frozen. This is done to enable the affected person to seek redress from Court.

The above process under the Ghana's Anti-Money Laundering Act is similar to the Economic and Organized Crime Office Act 2010, Act 804. Section 20 of the Act gives the power of search and remove documents without notice to the person. However, the Executive Director shall apply to the Court, without notice to the person or entity specified in the application to issue a warrant authorizing the Economic and Organized Crime Office's (EOCO) officers with the assistance of Police to search and remove a document(s) in the application brought before the Court.

The application before the Court is without notice to the entity or party. It therefore behoves on the Executive Director of the Economic and Organized Crime Office (EOCO) to convince the Court that those documents are very important to assist investigations. This is to prevent the abuse of Court processes by the Office.

Further, Section 20 (1) provides that, the Executive Director should give the reasons for the search and seizure. It should indicate that:

> ***the person or entity required to produce a document to the Office fails or refuses to produce the document.***
> ***the Executive Director is of the opinion that the service of the notice to produce a document shall prejudice the investigation, or***
> ***It is not practicable to give a disclosure notice requiring the production of the document".***

The legislators were of the view that, if notice is given to the person or entity vital documents may be shredded or removed. A list of this provision was made in the EOCO and GFA case in Ghana, where the Economic and Financial Crimes Division of the High Court issued a warrant to the EOCO to search and remove documents, which included computers from the offices of the Ghana Football Association. Infact, the Court's order further directed the officers to even go to the homes of the officers of the GFA to search and remove documents to assist in their investigation. However, this aspect was not executed.

Section 20 (5) gives any person or entity opportunity to apply to the Court within twenty-one (21) days to set aside the order. The section provides:

"20 (5) A person or entity from whom a document has been retrieved is entitled to apply to the Court within twenty-one days after the date of retrieval for an order.
to set aside the search, removal or

retrieval, and
for the restoration of the documents".

On Proceeds of Crime, with respect to tainted property, the Court again issues a warrant for search and seizure. This is also without notice to the owner or occupier of the land or premises. Whenever any item is seized and such items are perishable, the Attorney-General shall apply to Court for an order for the sale of the perishable items. The proceeds realized from such sale shall be paid into Court until the final determination of the trial.

Any person who has interest in any property seized has the opportunity to apply to the Court within thirty (30) days. This is under Section 31 of Act 804. It provides:

> *"31(1) A person who claims an interest in property seized under this Act shall apply to the Court within thirty days after the date of seizure for an order that the property be returned to that person".*

Under Sub Section (2) the Act further provides:

> *If the Court is satisfied that,*
> *the person is entitled to possession of the property,*
> *the property is not tainted and*
> *the person in respect of whose charge, proposed charge or conviction the seizure of the property was made has no interest in the property, the Court shall order the return of the property to the applicant.*

In Section 33 (1) and (2) the Executive Director has the mandate to freeze an account or transaction where the person or entity is under suspicion. He/she applies to the Court within fourteen (14) days after the freezing for a confirmation of the freezing. Normally, suspicious transactions by received from the Financial Intelligence Unit. They (FIU) disseminate the information to the Economic and Organized Crime Office. There is a procedure which the EOCO has to undertake. After it has received this Suspicious Transaction Reports (STRs) from the FIU, the EOCO writes to the Central Bank, which has oversight responsibility over all the Banks in the country for a directive to that particular Bank the suspicious accounts are held. That Bank will then freeze the account. It is after the freezing by the Bank that EOCO will then apply to the Court to confirm the freezing after fourteen (14) days. In the case of the FIU, it is seven (7) days. However, the Executive Director of EOCO shall inform the person or entity against whom a freezing order had been made within seven (7) days. With the provision in Act 749, the Anti – Money Laundering Act, it is forty-eight (48) hours of the freezing.

Statistics in the two Financial Crimes Courts indicate that, there are over 200 hundred accounts that have been confirmed frozen as from the beginning of year 2012. Unfortunately, no single case has been prosecuted. There have been nine (9) confiscations to the State. The highest amount is US$2.5 million and the least US$500.00. There was also some landed properties, a BMW that have also been confiscated to the state.

The following were the statistics of monies in various denominations confirmed frozen by the Financial and Economic Crimes Court in 2012.

- USD - 27,103,242.44

- Canadian Dollars - 11,980.00
- GH¢ - 4,171,470.47
- Euro - 635,555.92
- Pounds - 237,297.05

All these are kept in the Exhibit account of Economic and Organized Crime Office (EOCO) with the Bank of Ghana.

Any contract or agreement made by the person or entity affected by a freezing order is of no effect. In respect of an entity, the veil of incorporation is lifted to determine if the property is subject to the effective control of the respondent.

Our Section 38 (2) mandates the Court to release the frozen or restrained property if

> ***the person is not charged with a serious offence within twelve months of the date of commencement of the investigation, or***
> ***the person is acquitted of the serious offence.***

Of late, a lot of applications have come before the Court with respect to the release of the frozen or restrained properties. The applicants are invoking; Section 38 (2) (a). It is regrettable that, the EOCO has not been able in all such instances to convince the Court why such accounts should not be de-frozen or released to these applicants.

On the 12th June, 2012, the Community Court of Justice (CCJ) of ECOWAS based in Abuja, Nigeria awarded the Republic of Liberia 25% of an undeclared $508,200 confiscated from Mr. Valentine Ayika, a Nigerian businessman at the Roberts International Airport in Harbel, Margibi County, Liberia in September, 2006.
In its ruling in Abuja on Friday 8th June, 2012, the ECOWAS Court also ordered Liberia to return the rest of the money to Mr. Ayika, as its investigations showed he was not guilty of money laundering, the charge for which he was being investigated in Liberia. At the same time, the Court denied Mr. Ayika's claim of 21% interest incurred for the duration his money was confiscated, on the grounds that there was no legal basis for the claim.

Article 25 of the Rule of Court A/P1/7/91 provides for an application for revision of its decision only if based upon the discovery of new facts unknown to the Court. In Ghana, under Section 39 (1) a person who claims an interest in property which is the subject of a freezing order shall apply to the Court for a review of the order on notice to the Executive Director, within fourteen (14) days. Subsection (2) states:

> ***"the Court shall revoke or vary the order subject the order to conditions directed by the Court on hearing the interested party"***

In review applications of this nature, an entity may claim that, salaries and Social Security payments and deductions needed to be done. The Court has to order for better particulars as to the payment vouchers of the entity's workers as well as documents supporting the payment of Social Security to Social Security and National Insurance Trust (SSNIT). When the Court is convinced, an order is made for such payments or deductions to be made whenever necessary.

The Court can also extend the freezing order when called upon to do so. This may happen when the EOCO is unable to complete their investigations and prosecute within the stipulated twelve months. This extension will be for a specific period if the Court is satisfied.

Many jurisdictions only allow confiscation of assets on the basis of a criminal conviction. However, a criminal conviction is frequently not possible because the criminal case cannot proceed, for example because the perpetrator may be protected by immunities, have fled the country to avoid prosecution, or died, or because of lack of political will.

In Ghana, where a person dies or absconds, the Executive Director can apply to the Court for a confiscation order in respect of tainted property.
Section 50 (1) and (2) provides:

> ***50(1) The Executive Director shall apply to the Court for a confiscation order in respect of tainted property of the person from whom the property was seized dies or absconds and***
> ***there is information alleging commission of a serious offence by that person, and***
> ***a warrant for the arrest of that person is issued in furtherance of that information.***

In subsection 3, the Court shall before hearing the application for the confiscation order,

> ***"50 (3) (a) require notice of the application to be given to the person who appears in the opinion of the Court to have an interest in the property, or***
> ***(b) direct notice of the application to be published in the Gazette or a newspaper of national circulation containing the particulars in three publications within three months".***

The Court shall order property to be confiscated if the property is tainted, and there are proceedings in place in respect of a serious offence committed in relation to property in issue and lastly the person charged with the offence had died or absconded. In all three situations, the prosecution need to only prove the nexus between the property to the criminal. Any property confiscated vests absolutely in the Republic by virtue of the order.

Section 56 of the Ghanaian enactment is very revolutionary. This is in line with Article 54 (1) (c) of UNCAC. Any benefits derived from drug trafficking other than that of which the defendant had been convicted which had been established by evidence during the trial is also subject to confiscation. This position had been upheld in the UK case of R v Briggs – Price [2009] UKHL 19; [2009] WLR (D) 142.

Ghana passed the Mutual Legal Assistance Act, 2010, Act 807. This Act makes provision for request for freezing, seizure and confiscation of proceeds of crime.
It is the Court that issues a certificate in respect of the property designated for freezing, seizure and confiscation. See Section 55 (1) (b) and (2) of Act 807. Before a Court does that, there should be a confirmation that:

> ***there are reasonable grounds to believe that the whole of the property or part of the property is located in this country (Ghana)***
> ***a criminal proceedings have been instituted in the foreign state or by the foreign entity in respect of an offence connected to the relevant property, and***
> ***a criminal investigation is underway in the foreign state by the foreign entity in respect of a serious offence connected to the relevant property".***

As part of the Judicial Powers in the recovery of proceeds of crime, a Court in Ghana can enforce an alternative order from a foreign entity. This is under section 57 of the MLA Act 2010, Act 807.

In Ghana, management of proceeds of crime had been provided for under section 65 of Act 804 the Economic and Organized Crime Office Act. It provides:

> *"65 (1) where a pecuniary penalty order is made, not discharged and not subject to an appeal, the Court shall*
> *direct the Attorney-General to manage the property*
> *empower the Attorney-General to take possession of the realizable property subject to the conditions specified by the Court,*
> *order a person who has possession of the realizable property to give possession of the property to the Attorney-General;*
> *empower the Attorney-General to dispose of the realizable property in a manner as directed by the Court; and*
> *order a person who holds an interest in the property to make payment to the Attorney-General in respect of a beneficial interest held by the respondent or the recipient of a gift specified in this Act as the Court shall direct on an application by the Executive Director".*

It can be seen from the above provisions that, the powers of the Court have been well spelt out. Nothing can be done with respect to any realizable property unless the Court orders.

The Court has also been empowered to share the proceeds from the realizable properties. This has been provided under Section 66 of Act 804. This Section provides that,

> *"66 (1) The Court shall direct that an amount be paid to the Registrar of the Court out of the proceeds of the realizable property and that part of the amount be applied to defray the expenses of the office.*
> *(2)The Court shall direct the Attorney-General to pay thirty percent of the outstanding amount for the benefit of an institution of relevance to the action after full satisfaction of payment required under these provisions.*
> *(3)The Attorney-General shall until payment is made subsection (2), retain the thirty percent of the outstanding amount specified for the benefit of the institution of relevance and pay the rest into the consolidated fund".*

The question is, which institution is described as "institution of relevance" as in Section 66 (2). The following are the said institutions: -

- The Financial Intelligence Centre (FIC)
- The Economic and Organized Crime Office (EOCO)
- National Security and
- The Judicial Service

The reason is that, the FIC disseminate information to National Security and EOCO to investigate so they should benefit. EOCO does the prosecution upon the advice of the Attorney-General.

With respect to payment of some amount to the Registry, this to me is in line. This is because, the EOCO and Attorney-General

do not pay any fees when any processes are filed in Court.

It is therefore prudent that some amount is paid to the Court's Registry (Judicial Service). It is however unclear why the legislators did not give a percentage as has been done for others. The Court will however, not order any outrageous amount to be paid.

The management of proceeds of crime with respect to immovable properties is a major issue. There were times when the Courts appoint its registrars as managers and receivers. However, it has been found out that, management of such properties have not been that good. Some Registrars were reported to have refused to proceed on transfers because they were managing some assets. Well, if not mismanaging them.

In Ghana, the National Reconciliation Commission (NRC) Implementation Committee said that the de-confiscation of assets is not unconditional. The Committee indicated that those whose assets were confiscated during military regimes would have them back on a "where is", "as is" basis. A lot of these immovable properties were in very deplorable conditions when they were returned to their owners.

To avoid such unpleasant situations, it is suggested the Court can appoint firms as Price Water House Coopers and any management consult to manage such properties. When an asset has been seized, unless authorized for a pre-judgment sale, it should be preserved in the same condition it was at the time of seizure. Seized properties should be appraised to establish the market value of the asset at an appropriate time. This is why states may wish to use qualified third parties for this purpose.

Money laundering is an indispensable element of organized crime, narcotics trafficking, terrorist activities or arms trafficking. It is therefore imperative for all nations to enact the requisite laws and regulations to combat money laundering effectively. One such method is the establishment of an effective confiscation regime.

Traditionally, nations concentrate only on crimes not on proceeds. Legal provisions for confiscation of the proceeds generated from all types of serious crimes are the main tools to hinder money laundering. The focus of anti-money laundering legislation should include a strong confiscation provision. These will help curb the situation where criminals hide behind cronies, relatives and friends to conceal their wealth.

THANK YOU