

**RESTRICTION ON THE POWERS OF THE  
CORPORATE AFFAIRS COMMISSION TO  
REGULATE ASSOCIATIONS:  
EMMANUEL EKPENYONG V THE  
NATIONAL ASSEMBLY & 2 ORS (2023)  
5 CLRN 116**

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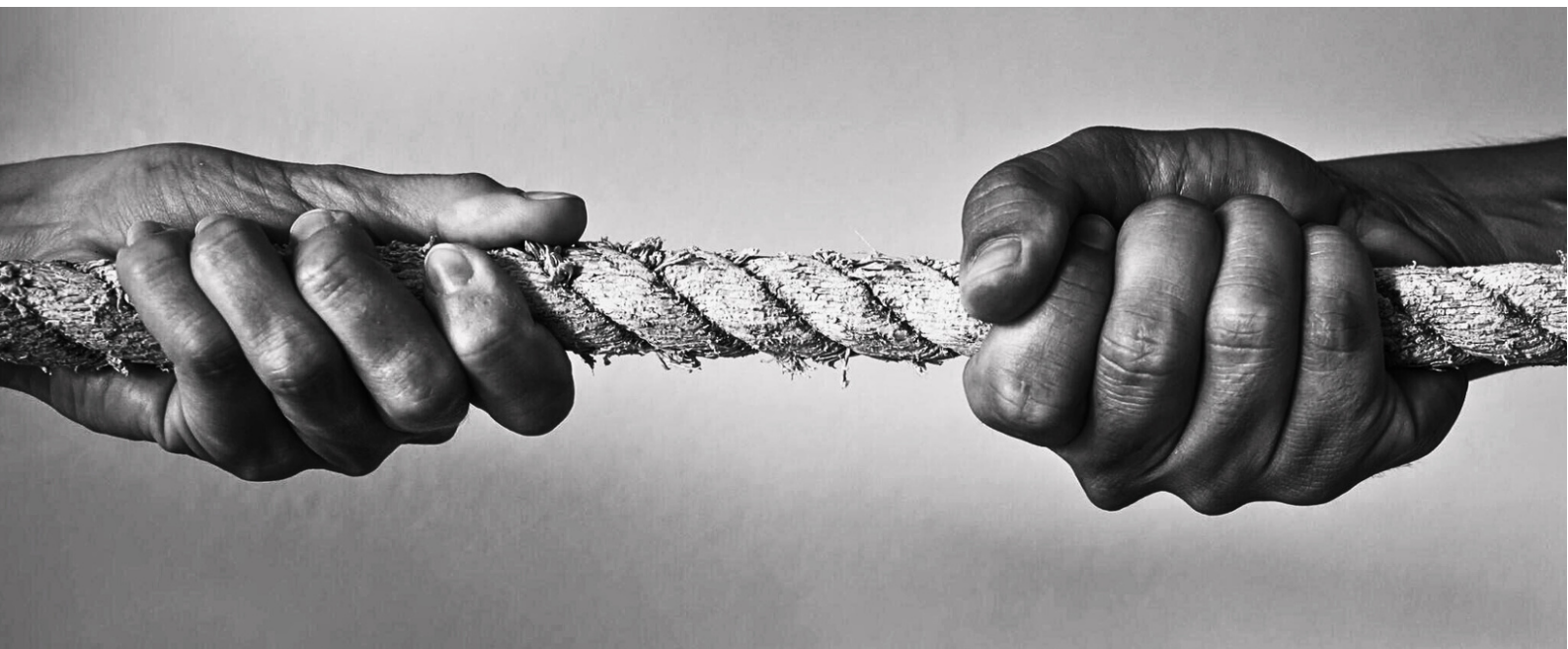
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## INTRODUCTION

Since its enactment, the Companies and Allied Matters Act 2020 (CAMA or the Act) has been commended as a significant development in the Nigerian corporate regulatory framework as it aims to improve the business landscape in Nigeria. The Act has also been applauded for introducing provisions targeted at raising Nigeria's ease of doing business ranking. However, despite these commendations, there are certain innovations in CAMA which have elicited commentary from stakeholders.

In particular, the provisions of CAMA with respect to the regulation and investigation of incorporated trustees under Part F as well as the establishment of the Administrative Proceedings Committee under Part G have both been declared null and void by the Abuja Division of the Federal High Court (FHC) in the case of **Emmanuel Ekpenyong v The National Assembly & 2 Ors**<sup>1</sup>. The FHC, in this case, declared that these provisions are inconsistent with the 1999 Constitution of the Federal Republic of Nigeria (as amended) ("the Constitution").

This publication will discuss the reasoning behind the judgement of the FHC as well as the implication of the judgement on the regulation of incorporated trustees.



## BRIEF REVIEW OF THE DISPUTED PROVISIONS OF CAMA

*Powers of CAC to investigate Incorporated Trustees and ensure their compliance with CAMA provisions*

Section 8 (1) (c) and (d) of CAMA, expanded the functions of the Corporate Affairs Commission (CAC or the Commission) to include the powers of CAC to arrange or conduct investigation into any incorporated trustee where the interest of members, partners or the public so demands. The section also vests CAC with the obligation of ensuring that Incorporated Trustees comply with the provisions of the Act, or any other regulations made by the Commission. The provisions are particularly defined in sections 839, 842 to 848 and 851 of CAMA.

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<sup>1</sup> Emmanuel Ekpenyong v The National Assembly & 2 Ors (2023) 5 CLRN page 116

*Powers of CAC to suspend trustees and appoint interim manager*

Section 839 (1) empowers CAC on the basis of a court order, to suspend the trustees of an association and appoint an interim manager to manage the affairs of the association where it believes that: (1) certain misconduct or mismanagement in the administration of the association has occurred; (2) it is necessary to protect the property of the association or public interest; or (3) it is necessary to prevent the fraudulent administration of the association's affairs. Section 839 (6) vests the court with the power to make orders relating to the administration of the funds of an association upon a petition filed by the CAC. This could range from orders directing a debtor of the association to make payments due to the association to an interest-yielding account held by the CAC or an order restricting the transactions which may be made or entered into by the association without approval. Additionally, Section 839 (11) gives the CAC powers to make regulations in respect of the functions, powers and remuneration of the interim manager of an association and the submission of reports to the CAC as may be necessary.

*Powers of CAC to dissolve Incorporated Trustees with dormant bank accounts*

Under sections 842, 843 and 844 of CAMA, the CAC has been bestowed with the powers to take certain decisions relating to a dormant bank account<sup>2</sup> of an association or to dissolve the association based on its dormant account. Under Section 842(1), a bank is mandated to immediately notify the CAC where the incorporated trustees hold one or more accounts, and each or any of the accounts is dormant. Following the receipt of this notice, the CAC may request that the association provide evidence of its activities and where the association fails to respond satisfactorily within fifteen (15) days of the request, the CAC may dissolve the association in accordance with the provisions of CAMA<sup>3</sup>. The CAC, upon the dissolution of the association, has the power to direct the relevant bank to transfer the credits in the dormant account(s) to such association(s) as it may specify<sup>4</sup>.

*Obligations of Incorporated Trustees to file bi-annual statement of affairs with CAC*

Section 845 of CAMA mandates that incorporated trustees are to submit bi-annual statements of affairs to the Commission, failing which each trustee shall be liable to pay a penalty for each day of default. Additionally, under Sections 846, 847 and 848 of CAMA, incorporated trustees are mandated to file annual returns and keep accounting records which shall disclose the transactions, assets, liabilities, and the financial position of the association, amongst other things, for a period of six (6) years from the date which the records were made.<sup>5</sup> The Commission also reserves the power to determine the financial year of Incorporated Trustees through regulations.<sup>6</sup>

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<sup>2</sup> In accordance with Section 844(2) of CAMA, an account will be dormant when no other transaction other than a payment transaction or a transaction which the bank itself has caused itself to effect on the account the period of five years preceding the date when the Commission is informed

<sup>3</sup> Section 842(2) of CAMA

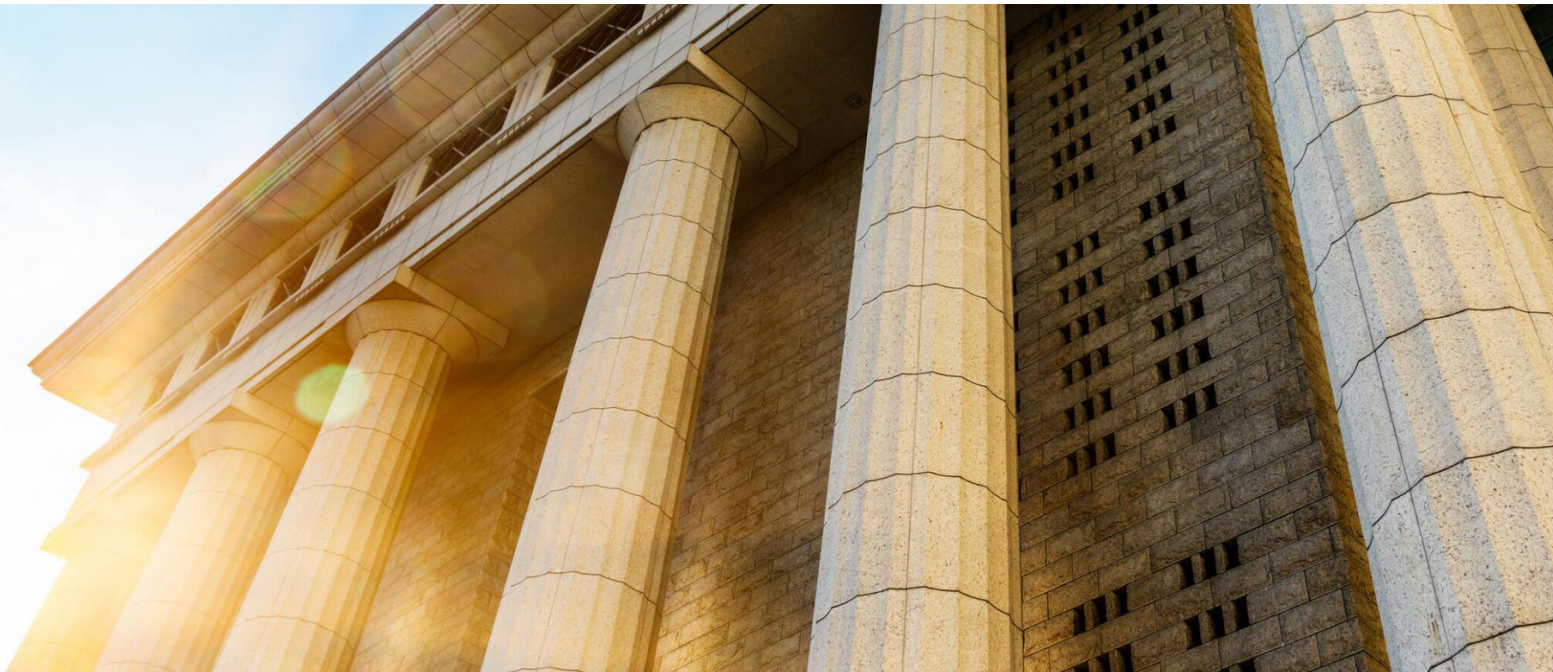
<sup>4</sup> Section 842(2) (a) and (b) of CAMA

<sup>5</sup> Section 846 and 847 of CAMA

<sup>6</sup> Section 846(5) of CAMA

*Powers of CAC to resolve disputes via the Administrative Proceedings Committee*

Section 851 establishes the Administrative Proceedings Committee (the Committee) as a forum to hear persons alleged to have contravened the provisions of CAMA. The Committee is empowered to resolve disputes or grievances arising from and impose penalties for the contravention of CAMA (and regulations made pursuant to it).<sup>7</sup> Some of the sanctions that may be imposed by the Committee include the imposition of administrative penalties, suspension or revocation of registration or the recommendation for criminal prosecution if any matter brought before it reveals any criminal conduct.<sup>8</sup> Finally, the decisions made by the Committee are subject to the confirmation of the Board of the CAC and can be appealed against at the FHC.<sup>9</sup> The Companies Regulations 2021 issued by the CAC, further provide the mode of operations of the Committee.<sup>10</sup> It is against this background that the Plaintiff in *Ekpenyong v the National Assembly*<sup>11</sup> challenged the constitutionality of Section 851 of the Act.<sup>12</sup>



## **THE CLAIMS OF THE PLAINTIFF IN EMMANUEL EKPENYONG V. THE NATIONAL ASSEMBLY & 2 ORS**

By an originating summons, the Plaintiff, in the case of *Ekpenyong v the National Assembly & 2 Ors*,<sup>13</sup> argued that the newly introduced provisions of CAMA as described above give unilateral powers to CAC in contravention of sections 6(6)(b), 36(1), 38, 40, and 251(1)(e) of the Constitution.

The Plaintiff contended that giving the powers to the CAC to suspend trustees; appoint an interim manager; make decisions regarding the accounts of the association - dormant or not; review the statement of accounts of the association; and ultimately determine the affairs of the association infringes on his right to freedom of thought, conscience and religion enshrined in section 38 of the Constitution.

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<sup>7</sup> Section 851(4) of CAMA

<sup>8</sup> Section 851(11) of CAMA

<sup>9</sup> Section 851(12) of CAMA

<sup>10</sup> Companies Regulations 2021

<sup>11</sup> n1

<sup>12</sup> Section 851(4) of CAMA

<sup>13</sup> n1

In addition, the Plaintiff asserted that the powers granted to the CAC under sections 839, 842, 844 to 848 of CAMA contravene section 40 of the Constitution which safeguards the rights to freedom of peaceful assembly and association. He argued that these sections would violate the rights of the members of the association to effectively participate in their activities as they will be unable to unilaterally determine their affairs and activities, thereby infringing on a member's right to associate peacefully with other members.

Furthermore, it was argued that the establishment of the Committee in section 851 of CAMA restricts the Plaintiff's right to access a court in contravention of sections 6(6)(b) of the Constitution which bestows judicial powers to the court and in particular the exclusive jurisdiction to the FHC to hear all matters arising from the operation of CAMA or its subsequent enactment under Section 251(1)(e) of the Constitution. Relying on the principle of law that a party cannot simultaneously be the accuser and the judge in its own case, the Plaintiff argued that his right to fair hearing under section 36(1) of the Constitution was infringed. He prayed that the said sections be expunged from the Act for the purposes stated above.



## **DECISION OF THE COURT AND IMPACT**

Agreeing with the Plaintiff, the FHC in its judgement held that the said sections of CAMA were inconsistent with the Constitution. The Court held that the provisions of CAMA give excessive powers to CAC over the affairs of incorporated trustees. The Court explained that in an instance where an association is a registered trustee of a church or community, and the CAC appoints an interim manager who is not a member of that church or community, this will violate the rights of the members to freedom of association and peaceful assembly. The Court also stated that one of the fundamental principles of such associations is the freedom to choose their own leaders and it would be erroneous to allow the CAC to meddle in the affairs of the association. Holding that the said sections were unconstitutional, the Court stated that allowing the disputed provisions in CAMA would lead to chaos and problems within the associations and arrogating such powers to the CAC is not justifiable as an exception under the Constitution.

In respect of the powers to transfer funds from a dormant account, the court decided that associations are voluntary and democratic in nature and the funds that they generate should not be subject to scrutiny by the CAC. The Court emphasised the distinction between incorporated companies and incorporated trustees by stating that CAMA was enacted for the regulation of the affairs of companies to protect investor funds and encourage foreign investment in Nigeria, thus, associations (which by their nature do not have investors) are not to be overly restricted by laws which may limit their liberty.

The Court also held that the creation of the Committee under CAMA amounted to a breach of section 251 of the Constitution as the powers to hear all matters arising from the operations of CAMA resides in the FHC and such powers cannot be usurped by the Committee. It was decided that Section 851 of CAMA cannot grant powers already granted by the Constitution to the Federal High Court as the Court of first instance to the Committee. On this basis, the court held that the provision conflicts with the Constitution and as such, is void to the extent of its inconsistency<sup>14</sup>

The Plaintiff succeeded in its claim as sections 839, 842-848, and 850 of CAMA were struck out for being inconsistent with the Constitution. In essence, these provisions of CAMA are inoperative until the FHC judgment is overturned or quashed by an appellate court

A similar case that comes to mind relating to the Court's decision in respect of the conflict with the FHC's jurisdiction in accordance with section 251 of the Constitution is the case of **FIRS v TSKJ Consucoes Internacional Sociedade Unipessoal LDA**.<sup>15</sup> In this case, TSKJ, in the trial court, argued that the FHC had the exclusive jurisdiction to hear matters relating to, connected with or pertaining to the taxation of companies and other bodies established or carrying on business in Nigeria. Therefore, the Federal Inland Revenue Service (FIRS) cannot ascribe itself with such powers by the establishment of the Tax Appeal Tribunal (the Tribunal) under the Federal Inland Revenue Service (Establishment) Act 2007 (the FIRS Act). For context, the main function of the Tribunal under the FIRS Act is to determine all matters relating to Companies Income Tax, Personal Income Tax, Petroleum Profits Tax, Value Added Tax, Capital Gains Tax, Stamp Duty, Taxes and Levies and any other taxes to be imposed by the National Assembly<sup>16</sup> Parties who are aggrieved by any decision or assessment of the FIRS are mandated by the FIRS Act to appeal to the Tribunal<sup>17</sup> Upon the decision of the Tribunal, parties who are still dissatisfied may appeal to the FHC upon giving notice in writing to the Secretary of the Tribunal within thirty (30) days from the decision.<sup>18</sup>

The trial court agreed with the Plaintiff and decided that the sections of the FIRS Act relating to the powers of the Tribunal to adjudicate matters on the taxation of companies and federal revenue were inconsistent with the provisions of Section 251(1) of the Constitution and void to such extent.

In overturning the decision of the FHC, the Court of Appeal in its judgement held that the Tribunal did not usurp the jurisdiction of the FHC under the Constitution. The Court believed that the Tribunal served as an administrative procedure or condition precedent which must be satisfied before instituting an action before the FHC. It decided that the Tribunal was a mere administrative tax tribunal which is not concurrent with the jurisdiction of the FHC and cannot be said to be a usurpation of the jurisdiction of the FHC.<sup>19</sup>

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<sup>14</sup> The court referred to the matter in *Adeogun & Ors v Fashogbon & Ors* (2008) LPELR – 131 (SC) where the apex court held that the Court must jealously guard its jurisdiction to hear and determine the case to its finality.

<sup>15</sup> *FIRS v TSKJ Consucoes Internacional Sociedade Unipessoal LDA* (2017) LPELR – 42868 (CA)

<sup>16</sup> Section 59(2) of the FIRS Act

<sup>17</sup> Paragraph 13(1) of the 5th Schedule of the FIRS Act

<sup>18</sup> Paragraph 17(1) of the 5th Schedule of the FIRS Act

<sup>19</sup> This was also the decision of the Court of Appeal in *CNOOC Exploration and Production (Nig) Ltd & Anor v. NNPC & Anor* (2017) LPELR-43800 (CA)

In light of the reasoning behind the Court of Appeal's judgement in the above case, there is a likelihood that the decision of the FHC in *Ekpenyong v. the National Assembly* may be overturned by the Court of Appeal as it can be argued that the Administrative Proceedings Committee under CAMA has only been introduced to serve administrative purposes as a condition precedent for the institution of an action before the FHC. The decision of the FHC in *Ekpenyong v the National Assembly* may be considered as a regression to persons who consider the Committee as a commendable forum introduced by CAMA to hasten the determination of CAMA-related disputes or as a sieve to reduce congestion of cases at the Federal High Court. Conversely, persons who have argued that the Committee will struggle with independence and partiality from the CAC have commended the decision in *Ekpenyong v the National Assembly*.



REGULATIONS  
COMPLIANCE

## CONCLUSION

As discussed in this publication, sections 839, 842-848, and 850 of CAMA have been expunged and rendered void by the decision of the Federal High Court in *Ekpenyong v the National Assembly* and as such those provisions are currently inoperative unless overturned on appeal or the execution of the decision is stayed by an order of court.

It is important to mention that the CAC, under the Companies Regulations 2021, restricted the matters to be determined by the Committee to disputes in relation to the names of companies and businesses, shares of private companies and the appointment or removal of a company's principal officers. This restriction, regardless of its aims, does not cure the issue of jurisdiction or infringement of a person's right to access the courts and be fairly heard as contemplated in the *Ekpenyong v. the National Assembly* case. It is important that this portion of the law is reviewed by the National Assembly or clearly determined by Supreme Court as it is important for the law to as much as possible be certain and clear at every given instance.

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