



UNIVERSITY OF BENIN

JOURNAL OF PRIVATE AND PROPERTY LAW

Resolving the Conflict between the Common Law Methods of Proving
Title to Land and Oath-Taking in Settlement of Land Disputes in Nigeria
Nelson Uwoh SOBERE & C. A. NDUBUEZE 1

Environmental Protection in Nigeria: The Utility of Incorporating
Artificial Intelligence (AI)
Violet AIGBOKHAEVBO 24

A Critique of Section 839 of Companies and Allied Matters Act 2020
Kenneth I. AJIBO 40

Injunctions against Foreclosure of Mortgagor's Rights: A Critique of
Section 26 of the Mortgage and Property Law 2010 of Lagos State
Efemena IGHORIMOTO 62

Climate Change and Women's Participation in Governance
Violet AIGBOKHAEVBO 69

The Concept of Rights: A Critique of Some International Instruments
Guiding the Conduct of Law Enforcement Officials against Human
Rights' Violations
Oyovwikerhi IMONI-OGBE 87

What are the Statutory Gains of Nigeria's Federal Competition and
Consumer Protection Act 2018?
Michael ATTAH & Happiness MOMOH 110

VOL. 8, 2024



A CRITIQUE OF SECTION 839 OF COMPANIES AND ALLIED MATTERS ACT 2020

Kenneth I. AJIBO*

Abstract

The Companies and Allied Matters Act (CAMA) 2020 provides a golden opportunity for Nigeria to fast-track her economic revival given the improvements in the Act. These innovations include but not limited to virtual general meetings, business rescue provisions for insolvent companies, provision for electronic filing and many others. However, the new power given to the Corporate Affairs Commission in the Act to regulate incorporated trustees is a major concern in Nigeria. The Act provides that where the Commission reasonably believes that any misconduct or mismanagement in administration of an association has occurred, or that the affairs of the association is being run fraudulently, or for the protection of the property of the association and public policy, the Commission may, by order, suspend the affected trustees and appoint interim manager(s) to manage the affairs of the association among others. This paper aims to examine the controversy trailing the provisions particularly as it affects the enjoyment of the guaranteed rights under section 40 of the 1999 Constitution of Nigeria (as amended).

1. Introduction

The Companies and Allied Matters Act (CAMA) 2020 is the main legal framework that regulates the operation of business entities and non-profits in Nigeria.¹ It is the legal regime that guides the registration, administration and dissolutions of businesses and associations.² The new law received plethora of monumental commendations from many stakeholders as it creates and eases the facilitation in the business

* LL.B (UNN), BL (Barrister and Solicitor of the Supreme Court of Nigeria), LL.M (Hull), Ph.D (Hull), UK, Senior Lecturer in Faculty of Law, Godfrey Okoye University Enugu. Email: kajibo@gouni.edu.ng

¹ Companies and Allied Matters Act hereinafter referred to as 'CAMA 2020'. The Act repealed and replaced the earlier CAMA 1990.

² CAMA 2020 was introduced as an Executive Bill in National Assembly on December 2019. Both the Senate and House of Representatives without much scrutiny from public hearing passed the bill in March 2020. The bill received the presidential Assent on August 7th, 2020, thereby replacing the old CAMA 1990.

community.³ Arguably, CAMA 2020 is adjudged as the Nigeria's most significant business legislation in three decades due to its innovations.⁴ A number of these innovations were obviously missing under the previous company's legislation in 1990.⁵ Nonetheless, the new CAMA introduces tougher regulations for associations registered under Part F as incorporated trustees.⁶ The section is very similar to the provisions in the United Kingdom's Companies Act 2006 on Charities.⁷ The question remains whether or not there is any need for regulation of these associations in the first place? Similarly, assuming the answer is in the affirmative, what is the extent of such regulation of these non-profits?

Indeed, there is no doubt that the power granted to the Corporate Affairs Commission (CAC) in the new Act with respect to the regulation of these associations is still deeply mired in controversy.⁸ This is because the provision grants the CAC the power to suspend the trustees of an association. Also, it gives the agency power to appoint an interim manager(s) to manage the affairs of the association upon a reasonable belief of the occurrence of certain conditions. These conditions include misconduct or mismanagement of the association's property and the need to protect them.⁹ This provision appears to be a borrowed part of what exists in other jurisdictions to spell out regulations for the management of civil society organisations and other non-profit associations.¹⁰ There is also a palpable fear being expressed within the

³ The new law is a welcomed development given the innovations including the benefits for companies by improving the ease of doing business. In this context, the word 'stakeholder' means persons or bodies that are affected directly or indirectly by these regulations.

⁴ The Act provides for remote or virtual general meetings, business rescue provisions for insolvent companies, new corporate structures, provision for electronic filing, establishment of a private company with only one member or shareholder and a lot more.

⁵ See the repealed CAMA 1990, s.18. These innovations above were notably missing in the previous CAMA 2020.

⁶ These associations include but not limited to: Non-Governmental Organisations (NGOs), Not-for-profit Organisations (NPOs); Civil Society Organisations (CSOs), Community and Faith-based Associations (churches and mosques) including Foundations.

⁷ See UK Companies Act 2006, s.226; see also, the UK Charities Act 2011.

⁸ See CAMA 2020, s.839.

⁹ Others include the need to redirect the association's property towards its objects, public interest or fraudulent running of the association's affairs.

¹⁰ See the UK Charities Commission Act 2011.

country whether the regulation of the NGOs and other sisters associations will be administered impartially to avoid breaching section 40 of 1999 Constitution of Nigeria (as amended). This concern is further heightened in view of the existing trust deficit among Nigerians given the possible abuse of power by the government regulating agency.

This paper aims to analyse the controversy trailing the provision of section 839 of CAMA 2020 given the concerns raised among the stakeholders that the regulation of the NGOs and other sister organisations in the Act may affect the enjoyment of the guaranteed rights under the 1999 Nigerian Constitution (as amended).¹¹ Similarly, the additional worry is that, as part of the failed 2016 NGO Regulation Bill, lawmakers arguably attempted to covertly control NGOs by including section 839 of CAMA 2020.¹²

Beyond the introduction, part two of the paper is the conceptual clarifications on association that can be registered under Part F of the Act as 'incorporated trustees' in the new CAMA 2020. Part three examines the power of the Commission to regulate these incorporated trustees and other sister associations. The legal basis for such regulations and its implications will be examined in comparison with the effect such regulation will have on constitutionally guaranteed right of association under section 40 of the constitution. Part four compares jurisdictions on NGO regulations. It also discusses the fears expressed by Nigerians on NGO regulations given the lack of trust existing within the Nigerian context. Part five is the conclusion which summarises the discussions.

2. Conceptual Clarification: Incorporated Trustees and NGOs

Incorporated trustees involve any community of persons bound together by custom, religion, kinship or nationality, or anybody or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting, or charitable

¹¹ See CFRN 1999 (as amended), s.40

¹² The earlier attempt to regulate the NGO in 2016 in Nigeria failed given the clamour by the stakeholders that it may infringe on the freedom of association which is a guaranteed right under the Nigerian Constitution. See the NGO Regulation Bill 2016.

purpose.¹³ Hence, any organisation that falls under this category can be registered as an incorporated trustee under Part F of CAMA 2020.¹⁴ From the date of such registration, the trustees shall become a body corporate by the name described in the certificate and shall have perpetual succession to sue and be sued, hold and be able to act on any property/interests belonging to the association.¹⁵

Similarly, non-governmental organisation (NGO) is any non-profit, voluntary citizens' group which is organised on a local, national or international level.¹⁶ Recognised internationally under Article 71 in the Charter of the United Nations Organisation in 1945, the NGOs have wide arrays of organisations.¹⁷ As an association, NGOs are registered as a 'trust entity' under the Nigerian CAMA 2020.¹⁸

Conceptually, a trust is a legal relationship in which the holder of a right gives it to another person or entity which must be kept and used solely for another's benefit.¹⁹ In other words, the legal concept of trust creates a fiduciary relationship whereby trustees are vested with the legal title over properties or assets for the benefit of others.²⁰ By virtue

¹³ Incorporated Trustees are non-business and non-profit making organisation formed to facilitate acquisition of corporate personality by a community of persons bound together by custom, religion, nationality or any association of person established for religious, educational, literary, scientific, social developments. See CAMA 2020, s.823.

¹⁴ Part F of CAMA 2020 regulates the affairs of associations such as: Non Governmental Organisations (NGOs), Civil Society Organisation (CSOs), Churches, Mosques and Clubs among others from their formation, management, and dissolution.

¹⁵ Ibid, s.830.

¹⁶ Ibid, s.823

¹⁷ These included but not limited to community groups, non-governmental organisations (NGOs), labour unions, indigenous groups, charitable organisations, faith-based organisations (Churches and Mosques), professional associations, foundations and others.

¹⁸ CAMA 2020, s.823

¹⁹ In Anglo-American common law, the party who entrusts the right is known as the 'settlor', the party to whom the right is entrusted is known as the 'trustee', the party for whose benefit the property is entrusted is known as the 'beneficiary', and the entrusted property itself is known as the 'corpus' or 'trust property'. A testamentary trust is created by a will and arises after the death of the settlor. An inter vivos trust is created during the settlor's lifetime by a trust instrument. A trust may be revocable or irrevocable; an irrevocable trust can be 'broken' (revoked) only by a judicial proceeding. See C Mitchell, D Hayton and P Matthews *Underhill and Hayton's Law Relating to Trusts and Trustees* (17th ed., Butterworths, 2006)

²⁰ Ibid.

of such fiduciaries, trustees are held in high regard in a trust relationship. The trustee is the legal owner of the property in trust as fiduciary for the beneficiary who remains the equitable owner of the trust property. Essentially, trustees have a fiduciary duty to manage the trust to the benefit of the equitable owners.²¹ As a result of that, trustees must provide a regular accounting of trust income and expenditures. Trustees may be compensated or reimbursed for the expenses incurred. Equally, a court of competent jurisdiction can remove a trustee where he breaches his fiduciary duty.²²

The CAMA 2020 provides that the NGOs are trustees appointed by a 'community of persons bound together by custom, religion, kinship or nationality or by anybody or association of persons established for any religious, educational, literary, scientific, social, development, cultural, sporting or charitable purpose.'²³ The trustees, therefore, 'own' the properties and assets of the 'community of persons' on behalf of their target beneficiaries.

3. Corporate Affairs Commission and the Regulation of Incorporated Trustees

The Corporate Affairs Commission (CAC) is the agency charged with the responsibility of regulating the formation, management, and the dissolution of companies and non-business entities under CAMA 2020 in Nigeria.²⁴ Under the new Act, the functions of the CAC have been widened to include the power to investigate the affairs of incorporated trustees where the interests of members or the public so demands including ensuring compliance with the provisions of the Act and other relevant regulations made by the Commission.²⁵

²¹ Ibid

²² Some breaches of fiduciary duty can be charged and tried as criminal offenses in a court of law. A trustee can be a natural person, a business entity or a public body. See A Hudson, *Equity and Trusts* (3rd ed., Cavendish Publishing 2003) 20.

²³ Ibid.

²⁴ The Corporate Affairs Commission (CAC) was established in 1990 vide Companies and Allied Matters Act No 1 (CAMA) 1990 as amended. CAMA 1990 was repealed and replaced by CAMA 2020 Cap C20 Laws of Federation of Nigeria. The establishment, structure and funding of CAC is now governed by the Companies and Allied Matters Act 2020. See generally CAMA 2020, Part A, s.1

²⁵ Ibid, s.8 (1) (a-c); see Nigerian Company Regulations 2021.

3.1 Suspension of Trustees and Appointment of Interim Managers

Under the expansive provisions of the Act, the CAC is empowered to suspend the trustees of associations and appoint the interim managers on the order of court. Thus, section 839 (1) of CAMA 2020 provides that the CAC can suspend trustees of an association and appoint interim managers to manage the affairs of the association where it reasonably believes that:

- (a) there is or has been misconduct, mismanagement in the administration of the association, or
- (b) it is necessary or desirable for the purpose of: (i) protecting the property of the association; (ii) securing a proper application for the property of the association towards achieving the objects of the association, the purpose of the association of that property, or of the property coming to the association; (iii) public interest; or
- (c) the affairs of the association are being run fraudulently.'

Sub-section 2 of this section provides that: (i) the trustees shall be suspended by an order of Court upon the petition of the Commission or Members consisting of one-fifth of the association, and the petitioners shall present all reasonable evidence or such evidence as requested by the Court in respect of the petition. Sub-section 3 provides for the hearing of the petition and the appointment of the Interim Managers by the Court with the assistance of the Commission.²⁶

3.2 Analysis of Contentious Issues in the Provision

First, section 839 of CAMA 2020 could literally imply that the trustees (owners) of an organisation, NGOs, including religious bodies, schools and other registered association can be suspended, and a manager can be appointed to manage the affairs of such an organisation. For example, a literal interpretation of this section appears to mean that the owners of a school can be suspended, and a manager can be appointed for the same position. Similarly, the owners of a church (in most cases

²⁶ CAMA 2020, s.839

ministers in the church) can be suspended, and a manager can be appointed. The provision of this law did not even specify the qualification, religion, or ethnic background of the new manager to be appointed when there is a suspension which remains a major concern to many stakeholders.²⁷ Essentially, lack of clarity in the provision could mean, for instance, that for a Church, a Muslim can be appointed and for a Mosque, a Christian can be appointed, and for a School, an illiterate person can be appointed as a manager to replace the removed trustees. This is because the section does not offer any credible benchmark within which to replace the suspended manager.

Second, the Act provides that the suspension can take place only when there is or has been misconduct, mismanagement in the administration of the association, to protect the property of the association, in the interest of the public or where it is sufficiently believed that the association is being run fraudulently.²⁸ While the new Act empowers the Commission to monitor and investigate these associations with respect to allegation of mismanagement or misconduct, it does not explicitly define what amounts to misconduct or mismanagement, leaving room for one to labour in assumptions.²⁹ Under the Nigerian Company Regulations 2021, 'misconduct' includes any act inconsistent with due and faithful discharge of duties of a trustee including negligence or want of proper care, dereliction of duty unprofessional or unethical conduct and moral turpitude in the administration of an association.³⁰

Third, the sub-section 2 of s. 839 of the Act provides that 'the trustees shall be suspended by an order of court upon the petition of the Commission or Members consisting of one-fifth of the association and the petitioners shall present all reasonable evidence or such evidence as requested by the Court in respect of the petition.'³¹ A careful perusal of

²⁷ Ibid

²⁸ Ibid, s.893(1)(a)(b)(c),

²⁹ Collins dictionary defines 'misconduct' as the improper conduct or wrong behaviour or unlawful conduct by an official in regard to his or her office. See <<https://www.collinsdictionary.com>> accessed 30 November 2023.

³⁰ 'Mismanagement' includes incompetence, carelessness or dishonesty in the administration of an association. See Company Regulations 2021, Regulation 31.

³¹ The process of securing the order would require the filing of an application/petition by way of a motion in court supported by strong affidavit evidence showing reasons why a suspension order and/or order for appointment of interim managers should be made. The application may be made by the Commission or one-fifth of members of the

the provision clearly shows that upon filing of petitions against the trustees, an order of court is required before the Commission can take the regulatory steps stipulated such as suspension of trustees and appointment of interim manager(s) over the affairs of an association or religious bodies.³² The order in question must be an order of a court of competent jurisdiction and not an order by the Registrar-General of CAC or the President of Nigeria.³³ In other words, this simply implies that the Commission cannot suspend the trustees of an organisation except by the authority of court or with a quorum of one-fifth support of members of association after sufficient evidence in the eyes of the court has been tendered.

The implication of this is that the Commission does not only have the right to petition the court for the misconduct carried out by the trustees of an association, but also the members of the association consisting one-fifth of it has the right to do so. While this appears to be a limitation to the likelihood of arbitrariness of the Commission given that every action taken is subject to the order of the court, nevertheless, this is still not enough safeguard in view of the fact that it is for the Court to know the law.³⁴ In essence, whatever the court considers 'sufficient evidence' is sufficient evidence, not forgetting that the judge is a human and might be opposed to the beliefs and objects of that organisation. However, it is also fair to state that a dissatisfied party has an option to appeal any unfavourable court judgement where allegation of likelihood of bias is in issue.

Fourth, sub-section 3 of s. 839 provides for the hearing of the petition and the appointment of the interim managers by the Court with the assistance of the Commission. This sub-section summarises the clarification of the system of checks and balances among the Commission, Members and the trusteeship of an association. This is attained by the order of court which provides that the hearing of the petition and appointment of interim managers are to be assisted by the Commission but subject to the court's scrutiny.³⁵ However, with respect

association or religious body

³² CAMA 2020, s.839 (6).

³³ Ibid.

³⁴ *juria novit curia* – the principle that the judge always knows the law.

³⁵ CAMA 2020, s. 839(6) (a) states that the suspension cannot last forever as it must not

to interim managers, the CAC is to make regulations regarding the power, functions and remunerations of interim managers as well as reports relating to interim administration.

Obviously, the generality of this section remains only exercisable with the approval of the Trade Minister.³⁶ Arguably, this provision is a bit disturbing in view of the fact that as an appointee of the government, the loyalty of such a supervising Minister lies first with the appointing officer. In essence, this could provide an opportunity for government interference or abuse in the running of such associations. It is argued that without adequate safeguards to protect these associations, it would give some credence to the earlier fears expressed by stakeholders that the government brought back the purported stringent regulation that could not be introduced in the previous 2016 NGOs Regulation Bill.³⁷ Essentially, this is especially concerning in light of the apparent covert attempt to control NGOs and other non-profits without a thorough discussion in the disastrous 2016 NGO Regulation Bill, which diminished the public confidence.³⁸

3.3 The Botched 2016 Draft NGO Bill

The failed 2016 draft NGO Bill was intended to set up a Commission for regulation of NGOs in Nigeria on all sphere of its operations. For instance, the Bill required all NGOs to be registered with the Commission and issued a license to operate in Nigeria.³⁹ However, the Bill gives broad powers to the NGO Commission to receive, approve or refuse registration of the NGO, if it so pleases, thus making it almost impossible to associate.⁴⁰ The failed Bill does not acknowledge the registration covered by the CAMA 2020 which is the law that regulates the incorporation and winding up of companies and other NGOs in

exceed 12 months.

³⁶ Ibid, s.839 (11).

³⁷ Part of the trust deficit between the regulator and the associations was as a result of the controversial provision in Clause 26(2) of NGO Regulations Bill 2016 that sought to empower the Commission to monitor the activities of the NGOs.

³⁸ Ibid.

³⁹ The Bill proposes a Commission with board members made up of several government representatives with three NGO representatives, where latter members must be approved by a National Voluntary Organization Agency before they can be appointed as members of the board. See the Draft NGO Bill 2016, s.11.

⁴⁰ Ibid, s.13

Nigeria. In that regard, an 'un-registered NGO' due to the refusal of the Commission, cannot operate in Nigeria even if such an NGO has already been registered by the Corporate Affairs Commission and deemed a body corporate entity with legal powers to sue and be sued.

However, it is settled under the Nigerian law that freedom of association whether as an individual or a body corporate remains a protected right in our constitutional jurisprudence.⁴¹ Arguably, where a law tends to stifle democratic norms and rights, such laws cannot be deemed to be in the best interest of that society in view of the fact that it is most likely that its application will breach the constitutional guaranteed rights. One agrees that many of such constitutionally protected rights are not absolute.⁴² Indeed, they have some limiting provision.⁴³ However, the limitation of any qualified right must be carried out as constitutionally provided. The right to associate is guaranteed by the Nigerian Constitution in section 40 which provides that:

Every person shall be entitled to assemble freely and associate with other persons, and in particular he may form or belong to any political party, trade union or any other association for the protection of his interests...'

However, the constitution also provides that the "right to associate" can be limited, but such a limitation must pass the constitutionally provided test in Section 45 (1) (a) & (b) which says that the 'law limiting the right must be justifiable in a democratic society, and in the interest of either public safety, defence, public order, public health,... 'or for the purpose of protecting the rights and freedoms of other persons'.

The proposed NGO law that purports to improve transparency, accountability and for the purpose of record keeping of NGOs in Nigeria has wide and sweeping powers that can vitiate constitutionally guaranteed freedom of association. Thus, such a bill has the potential to

⁴¹ CFRN 1999 (as amended), s.40

⁴² *Ibid*, s.45

⁴³ *Ibid*.

restrict the freedom of association being enjoined by Nigerians. Indeed, it would affect the fundamental rights of religious bodies and humanitarian agencies including various organisations in Nigeria. Curiously, while this contentious bill was still pending before the National Assembly given the public criticisms of the alleged surreptitious attempt to regulate NGOs without a rigorous debate, CAMA 2020 was signed into law with a controversial provision under section 839 that seeks to regulate NGOs and its sister organisations.

3.4 Major Concerns for NGOs under CAMA 2020

As stakeholders in the Nigerian project, many faith-based institutions particularly the Christian community have expressed profound reservations about some of the seemingly contentious provisions under section 839 of the CAMA 2020. The previous actions by the government of attempting to secretly regulate the NGO and other associations embolden the suspicions held by these faith-based institutions. It can be argued that it is not in any way out of place to hold such reservations by these institutions regarding the legal provisions that empower possibly clandestine intentions of the government without rigorous debate about its objectives.

In fairness with the provision, the Act does not specifically mention church, mosque or any particular religion. However, the provision primarily seeks to introduce long overdue reforms in both public and private sector governance. Accordingly, the purpose of such reform is to attain the ease of doing business in Nigeria. However, the fear expressed by some sections of the Christian community remains that section 839 of the Act is a surreptitious attempt by the government to control the faith-based organisations in order to suppress or stifle its members from freedom of assembly or association protected under the constitution with some limitation.⁴⁴

For clarity, Nigeria is a secular state as enshrined in the constitution.⁴⁵ Similarly, the Nigerian constitution provides for the religious freedom.⁴⁶ For instance, section 38 (1) in Chapter Four of the Constitution provides

⁴⁴ Ibid, s.40

⁴⁵ Ibid, s.10.

⁴⁶ Ibid, s.38

thus:

Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief and freedom (either alone or in community with others, and in public or in private), to manifest and propagate his religion or belief in worship, teaching, practice and observance.⁴⁷

The religious institutions regard section 839 of the new CAMA 2020 as an infringement to their fundamental human rights as provided in the 1999 Constitution of Federal Republic of Nigeria (as amended), with respect to freedom of 'peaceful assembly and association.'⁴⁸ However, one should not be unmindful of the fact that constitutional interpretation is not to be read in isolation. Rather, there should be a community reading with other provisions. In fairness to the rule, the rights to freedom of religion, peaceful assembly and association are not absolute as they are grounded at the expense of the limitations provided in section 45(1) (a) (b) of the same Constitution.⁴⁹ Section 45(1) provides that:

Nothing in these sections 37, 38, 39, 40 and 41 shall invalidate any law that is reasonably justifiable in democratic society (a) in the interest of defence, public safety, public order, public morality and public health or (b) for the purpose of protecting the right or freedom of other persons.

Aside the above provisions, religious bodies are under the authority of the Government. This is the reason why these associations are all registered with the Commission as incorporated trustees in the first place.⁵⁰ Similarly, the Nigerian Government in the wake of Covid-19 pandemic banned religious activities and the ban stood in the country. Religious bodies also enjoy the mandate to work hand in hand with the

⁴⁷ Ibid.

⁴⁸ Ibid, s.40

⁴⁹ Ibid.

⁵⁰ See the Repealed CAMA 1990, Part C on registration of Incorporated trustees.

Government. For instance, religious bodies especially the Churches assist the Government to administer marriages under the Marriage Act, by issuance of valid Government marriage certificate after the celebration.⁵¹ The implication of this is that the government has always applied some form of control or perhaps regulation on these associations.

Moreover, worthy of note is that all the procedural steps needed to pass a bill were followed in this case and several interest groups made representations to the National Assembly during the public hearings which was composed of people of all faiths, beliefs including Moslem clerics and Pastors, among others from across the entire length and breadth of the country. Also the section and its sub-sections are to be read communally and not in isolation under the rules of interpretation of statutes.

Contrary to the views of the faith-based institutions, the sub-sections of section 839 provide the condition precedent for the suspension of the trustees and interim take-over of an association. In other words, it provides that suspension is possible where there has been any misconduct or mismanagement in the administration of the association, or if it is necessary or desirable for the protection of the property of the association or to ensure its proper application towards its set objectives. It also provides that an order of court would be required to do this and in approaching the court by the Petitioner or the Registrar-General (RG), the application must be supported by 20% of the association who shall also present all reasonable evidence of their allegations to the court.⁵² Arguably, this does not in any way imply vesting discretionary powers in the Office of the Registrar-General to form and dissolve associations. But, the Christian Association of Nigeria (CAN) has not hidden its grievances about the provision and its sub-sections by approaching the court to determine its legality or otherwise.

In essence, CAN filed a lawsuit earlier as a party who was wronged by its rejection of CAMA 2020, particularly with regard to the regulatory responsibilities the Act allocated to the Registrar-General of CAC and a

⁵¹ See the Marriage Act and Matrimonial Causes Rules in Nigeria. Religious leaders have always assisted the Government in making certain critical decisions.

⁵² CAMA 2020, s.839

supervising minister over churches. In an originating summons, the Plaintiff (CAN) had prayed the court to determine:

- (a) Whether section 839, subsections (1), (7) and (10) of CAMA 2020 is inconsistent with sections 4(8), 6(6)(b) and 40 of the Nigerian constitution which guarantees the plaintiff's right to freedom of association and the right to seek redress in court'
- (b) Whether the provision of section 854 of the CAMA 2020 is inconsistent with section 39 of the Nigerian constitution which guarantees the right to freedom of expression.

CAN had among other prayers sought the Federal High Court to declare through the above issues that Section 839(1), (7) (a) and 10 of CAMA 2020 are inconsistent with section 40 of Constitution of Federal Republic of Nigeria (CFRN) and thus unconstitutional, null and void. Sadly enough, the Federal High Court had dismissed the case on technical grounds as the plaintiff did not comply with the name used in filing the originating summons including non-compliance with the requirement of pre-action notices.⁵³ It is hoped that in the nearest future, the Christian community will re-initiate the matter again as a proper juristic person to determine those issues on merit. Proper interpretation of these issues will advance the knowledge of law. Arguably, such determination by the courts can address the past, current or impending systemic issues, and every law is tested only when its provisions are properly interpreted by the competent courts with jurisdiction.⁵⁴

4. Jurisdictional Comparison on NGOs Regulations

It seems that section 839 of CAMA 2020 is reminiscent of UK Charities Commission Act 2011 which makes provision for the suspension and appointment of interim managers.⁵⁵ The UK Charities Commissions Act 2011 provides that the Charities Commission has power to identify and investigate the apparent misconduct or mismanagement in the administration of Charities.⁵⁶ This includes taking remedial or

⁵³ Public Officer Protection Act (POPA) 1916 Cap P41 LFN 2011, s.2 (1)

⁵⁴ *Madukolu v Nkemdilim* (1962) 2 SCNLR 341

⁵⁵ See UK Charities Commission Act 2011, s.15. Section 839 of CAMA 2020 appears to have been directly lifted from the UK Charities Commissions Act 2011.

⁵⁶ UK Charities Commission Act 2011, s.15 (1-3).

protective action in relation to the misconduct or mismanagement in the administration of Charities.⁵⁷ The order that can be made by the Court is similar to those inserted in the new CAMA 2020. However, the UK provision is more specific in terms of coverage than the provisions embodied in the Nigerian legislation.

The main difference between the Nigerian legislation and the UK law is the process of initiating the suspension and who makes the order. The provision in the UK law states that the 'Commission may on its own motion' do so.⁵⁸ Similarly, with respect to misconduct and mismanagement, there are conditions that must be met which is that the commission is to be satisfied that a particular person is responsible for the said act or that the person knew and failed to take reasonable steps to oppose it or that a person's conduct contributed or facilitated it.⁵⁹

A related provision in another jurisdiction can be found in the Australian legislation.⁶⁰ The Australian Charities and Not-for-profits Act 2012 provides for the suspension and/or removal of responsible entities which could include directors or trustees. Similarly, once a trustee is removed, another trustee cannot be re-appointed by the association. Additionally, unlike in Australian legislation, the phrase 'members and reasonable evidence' are not defined under the Part F of CAMA 2020. With respect to members, it is not clear whether this refers to trustees only or include others persons. In relation to reasonable evidence, the Australian law provides for the Commission in charge to issue a 'show cause' notice showing the grounds for the suspension and requesting a written statement from the non-profits showing a cause on why they should not be suspended. In the Nigerian legislation, the new CAMA does not provide for remedial action that can be taken prior to a petition being filed in court.

4.1 Need for Regulation of the NGOs

The pertinent question remains whether there is any need to regulate the non-profits or NGOs in the first place. The simple answer to this is

⁵⁷ Ibid.

⁵⁸ Ibid, s.76

⁵⁹ Ibid, s.76A.

⁶⁰ See Australian Charities and Not-for-profits Act 2012.

in affirmative given the benefits and subventions from the government. As registered entities, it is not in contention that NGOs, including the religious bodies, should be subject to some form of regulation. In fact, by virtue of its composition, it should be subject to stricter regulations than private companies given that these organisations accept donations and aids from the general public. Associations, by definition, work for the common good of their members and target audience. It is not too much to insist that the said common good is not diverted by some managers for their personal gains. Transparency and accountability must be exercised, not just within government, but also in the corporate and associational sectors including religious bodies.⁶¹

A key demerit for non-profit or charities is the regulation including the public scrutiny that goes with tax incentives received. Most common law and civil law jurisdictions extend tax advantages to associations established for public benefits such as NGOs and charities. State benefits come in form of tax exemptions on organisation's income; tax incentives from organisation's donors, property tax relief including VAT reliefs in some cases. Whatever form the benefits take, a key principle is that State incentives or preferential tax treatment triggers some form of regulation.

In Nigeria, unlike in many other jurisdictions, the NGOs registered under the new CAMA as non-profits do not enjoy any reasonable tax incentive. Registered NGOs and other sisters associations are exempted from corporate tax. Companies that make donations to such organisations involved in philanthropic gestures can get a tax deductible donation not exceeding 10% of the tax profits of that company for that year.⁶² Sadly enough, unlike in many countries,

⁶¹ It is believed that the NGOs should be regulated to ascertain the source(s) and purpose(s) of the funding they receive in order to prevent money laundering, threats to national security, and to promote transparency and accountability through public records-keeping. Along these lines, extant laws should be made to accommodate present realities and agencies strengthened to enhance enforcement. But this should not be remotely connected with the usually held view that regulation of NGOs in Nigeria is meant to suppress their freedom of expression to act as watchdog to criticise the government policies and actions. Freedom of expression is a protected right although not absolute in the constitution. See Constitution of Federal Republic of Nigeria (CFRN) 1999 (as amended) ss.39, 45.

⁶² Countries go to the extent of providing for non-profit in difficult time such as during

Nigerian law does not provide for similar deductibility of donations made by such individuals. For example, persons making donations to the churches or to a charitable cause cannot get deductions on their donations. Also, Nigerian government does not provide property tax reliefs for NGOs nor any evidence exists to show that NGOs receive subventions from the government. In fact, any form of profit made from NGOs in the cause of their work is taxable including the profit made from assets sold.⁶³

Many developed countries around the world go to the extent of providing for other benefits for non-profits in difficult time such as Covid-19 pandemic. For example, the US non-profit sector received some assistance from the government through the Coronavirus Aid, Relief and Economic Security Act (CARES Act 2020).⁶⁴ The law provides for loans to pay staff, rents and utilities, interest on mortgage or debt obligations.⁶⁵ Neither the Federal nor the State government in Nigeria has provided such measures for the non-profits. It should be noted that incentives for individuals or corporations donating to non-profits are an avenue to incentivise private philanthropy to assist public benefit activity toward advancing the cause of NGOs.⁶⁶ In established societies, regulation is needed to secure the organisation's asset. Thus, it protects the public from fraud or deception including to ensure that tax exempt status is not abused.

In terms of regulation, the practice varies among countries. For instance, the US non-profits are regulated by both the federal and state laws.⁶⁷ Religious bodies and associations with less than \$25,000 in gross receipts are exempted from filing annual returns to IRS. In some European countries, the NGOs/Non-profits are regulated by tax or fiscal authorities given that they are responsible for ascertaining the requirement for maintaining a tax exempt status. Others entrust this regulatory duty with Ministry of Justice, the Courts or an established

the period of covid-19 pandemic

⁶³ See Companies Income Tax Act (CITA) 2004, sections 23-25

⁶⁴ See the US CARES Act 2020

⁶⁵ Ibid.

⁶⁶ See the objectives behind the South Africa's Non-profit Organisation Act 1997.

⁶⁷ American non-profits registered with Internal Revenue Service (IRS) are exempt from federal income taxes based on subsections 50(1) (c) (3) of Tax Code. Same applies to the States.

Commission. For instance, the UK Charities Commission in England and Wales was created by the Act of Parliament for the purpose of managing charities which is devoid of political interference.⁶⁸

Unlike in many jurisdictions, the CAC in Nigeria is neither independent nor insulated from political meddling. The CAC is largely accountable to the Executive while the UK Commission is accountable to the Parliament.⁶⁹ The best international practices across developed democracies is to insulate the Commission from interference from the politicians by ensuring that it remains accountable to Parliament so as to protect its activities from politicisation or abuse.

4.2 Trust Deficit in Nigeria

Trust is the foundation upon which the legitimacy of any public or private institution is grounded. Due process does not enjoy a pride of place in Nigeria which fuels mistrust about government actions or inactions. In other words, thorough investigation of allegation of facts cannot be guaranteed at all times in Nigeria.⁷⁰ While it can be argued that regulation of NGOs is not limited to Nigeria, however, the level of mistrust existing between the government and NGOs cannot be ignored. NGOs in Nigeria are still struggling to register their relevance given the assumptions in the government arena that they are unelected opposition or anti-establishment lacking legitimacy. In the same vein, the NGOs view every government action or inaction with suspicion given the existing trust deficit. Moreover, Nigeria's worsening human right record, insecurity, corruption, lack of due process and difficulty in getting justice has further deteriorated the relationship between the government and the NGOs. A further reflection of this deficit can be

⁶⁸ Charities that have an annual income of less than £5,000 are not required to be registered with the Commission.

⁶⁹ CAMA 2020, s.9 provides that the Commission shall appoint the Registrar General (RG). But, in practice, the appointment is made by the President. The Board Chairman is also appointed by the President on the recommendation by the Supervising Minister. While the law sets up a qualification requirement of the RG, it does not outline the appointment or removal procedure.

⁷⁰ Just like the case of the controversial removal of a former Chief Justice of Nigeria - Hon. Justice Walter Samuel Nkanu Onnoghen - from office based on an outrageous ex parte motion, brought pursuant to no known law or Rules of Court, contrary to the established procedure in the Constitution

seen from the deluge of opposition that greeted recent government attempt to regulate the use of social media which is still pending in the National Assembly.⁷¹

There is a postulation across Nigeria that section 839 of CAMA 2020 is a clandestine attempt to summarily entrench the intention of a failed 2016 NGO's bill into law and it seems as though this time the government attempt was a success.⁷² Arguably, it makes some sense that NGOs should be regulated in Nigeria but only to the degree of ensuring procedural legalism in their activities but not to the point of management change or serving as to suppress their critical roles. To be fair, NGOs in some countries have secondary sinister businesses most especially as it concerns the legitimisation of unclean or slush funds which is a method of tax avoidance - including acting as a front for money laundering.⁷³ Viewing it from this standpoint, it could be argued that the intention of the Nigerian government was borne out of the need to sanitise the organisations that by direct involvement or by connivance engage in financial improprieties in the name of charity. On the flip side, a history of non observance of rules of practice and procedure on the part of government makes it harder to trust the intention of this kind of motive by the affected community.⁷⁴

⁷¹ Other examples of controversial Bills pending in the National Assembly include but not limited to: Social Media Bill and Hate Speech Bill.

⁷² During the first term of President Buhari, there was a Public Hearing conducted by the National Assembly (Parliament) on the Non-Governmental Organisation's Bill tagged 'Bill for an Act To Provide For The Establishment Of The Non-Governmental Organizations Regulatory Commission For The Supervision, Co-ordination And Monitoring Of Non-Governmental Organizations' which was attended by Christian Association of Nigeria (CAN) and many NGOs. At the Public Hearing, the Bill that sought to bring the religious organisations and NGOs under the control and influence of the government was totally rejected because it would snuff life out of the church and rank the church as a secular institution under secular control.

⁷³ H Chitimira and O Animashaun, 'The Adequacy of the Legal Framework for Combating Money Laundering and Terrorist Financing in Nigeria' *Journal of Money Laundering Control* [2023] 26(7) 110-126

⁷⁴ A 2020 Edelman Barometer which surveyed Nigeria shows that government is the most mistrusted institution, with CEOs and NGOs receiving the higher trust rating. See Guardian Newspaper Editorial: '2020 Edelman trust barometer reveals Nigerians still distrust government, place trust in CEOs.' Available: <https://www.guardian.ng/business-services/2020/edelman-rating> accessed 30 November 2023).

Moreover, the provision with respect to religious bodies is hugely worrisome considering the fact that Nigeria is made up of people of diverse religions, predominantly Christians and Muslims. Indeed, issues of religion in Nigeria are considered as very delicate. The Commission can move against any association and there would not be much problem or agitation. But with respect to religious bodies, caution must always be taken given that issues of faith in Nigeria are always viewed with some scepticism especially if it arose from the government circle.

5. Recommendations

In fairness to the rule, the loophole emanating from this poor drafting which may give room for some abuse or exploitation can still be improved on. For instance, it ought to have been expressly stated in the statute that in the case of religious bodies, an interim manager must be a person who is a member of the same faith or a person that shares the same or similar religious beliefs. With that, a Muslim cannot be made to act as interim manager in a Christian community and vice versa.⁷⁵ To be candid with the criticism of the provision, a better drafting technique such as the example provided above has the potential to eliminate possible controversy with respect to section 839 of the Act.

Second, approaching the National Assembly for an amendment of this provision by unsatisfied party is a viable option which can be explored, however, one cannot be sure on how long this process will take or whether the National Assembly will be willing to concede defeat by amending a new law it prides as one of its greatest achievements.

Third, it is a common knowledge that religious bodies have effective internal mechanisms for sorting out issues of mismanagement or misconduct, even criminal allegations such as fraud. In appropriate cases, religious bodies will report allegation of fraud or criminality to the relevant authority for action. Where dispute relating to property or finance arises, the religious bodies can resort to court for determination

⁷⁵ The Catholic Church cannot entertain a Pentecostal acting as interim manager and vice versa. The courts are encouraged to exercise high discretion along these lines in the absence of clear express provisions.

of ensuing rights and liabilities. It is submitted that whatever the good wishes of the Government might be in introducing section 839 to apply to religious bodies, it is necessary that the Government should focus her attention on other important areas of governance and manage her own affairs more effectively.

Moreover, the truth is that before the CAMA 2020, incorporated trustees and the majority of the churches in Nigeria had enjoyed a minimal regulation under the erstwhile 2004 CAMA and even under the major tax laws in Nigeria.⁷⁶ All of the churches in Nigeria seem to enjoy huge tax breaks either in income or corporate taxing under the notion that churches are non business entities.⁷⁷ However, the advent of this new law seems to have altered this position and by the import of the new Act, incorporate trustees are now on the radar of the government with this having the implication that the church which has enjoyed a fair amount of regulatory anonymity will now be regulated by the laws of the state like every business. This implies that the government will have the right of 'remove and replace' over an incorporated trustee.

5.1 Conclusions

The Nigerian Government and its agencies should rise up to the occasion and ensure that due process is followed at all times and that the constitution is respected and upheld. The Government and its agencies, especially the Commission, must not allow any act of abuse and reckless show of power. When a Government is responsible and enjoys credibility and integrity, the people will exercise more faith in its mission. Also, by the literal interpretation of the word "Non-governmental," it should naturally be inferred that the running of such organisation should be free from any form of governmental interferences and an attempt to do so will entirely defeat the motive behind the establishment of an NGO. What many have failed to realise is that this attempt at regulation under s. 839 of CAMA 2020 brings alive the possibility of removing any associational chairman such as ASUU Chairman, NLC Chairman, NMA Chairman, NBA Chairman all on bogus claims of misconduct or financial improprieties. On the whole,

⁷⁶ see Companies Income Tax Act (CITA) 2004, sections 23-25

⁷⁷ Ibid

Kenneth I. AJIBO

as long as the intention of the government remains suspicious, the effort by the government to widen its regulatory ambit without corresponding accountability and transparency on her part will be met with public resistance and scepticism.