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THE IMPACT OF SECTION 43(2) OF THE PLANT VARIETY PROTECTION ACT 2021

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Introduction

The introduction of the Plant Variety Protection Act (PVPA) in Nigeria created intellectual property (IP) right incentives to breeders as well as an access to foreign collaboration. The lack of a regulatory framework protecting IP in new plant varieties had discouraged foreign collaboration and partnerships with plant breeders in Nigeria. While plant breeders, farmers, and stakeholders in the agricultural sector have welcomed the development, one major concern of stakeholders is the implication of section 43(2) of the PVPA on the rights of breeders to appeal any unfavourable decision by the Minister concerning their application or representation. By the provision of the section, any decision of the Registrar as regards refusal, nullification, or cancellation of a breeder's right can be appealed to the Minister of Agriculture, whose decision shall be final. It is feared that the finality of such a decision deprives an appellant of the right to seek remedy in a court of law. This article seeks to analyse the said provision and offer recommendations thereto.

Background

The Act confers Breeder's Rights on Breeders who introduce plant varieties that are new, distinctive, uniform, and stable. This right underpins a breeder's prerogative to, *inter alia*, produce or reproduce, sell, offer for sale, market, export or import the propagating material of any protected variety. [1]

However, crucial to the enforcement and optimum exploitation of breeder's rights created under the PVP Act, is the need to effectively administer the Act in such a way that allows for a facile application procedure for the registration of the rights. Also, an equal *desideratum* is the provision of seamless access to efficient and potent mechanisms for the redress of potential breach of rights provided for under the Act. To cater to this necessity, the Act creates the office of the Registrar [2], which is tasked with duty to, oversee the grant of breeder's rights as well as to maintain the register for the provision of information concerning breeder's rights issued in Nigeria.

The Registrar is also empowered by the Act to make certain decisions which affect the rights of breeders and applicants alike. These decisions include the rejection of an application for a breeder's right, as well as nullification [3] and cancellation [4] of the breeder's rights. Where a party is aggrieved by the decision of the Registrar, Section 42 & 43 of the Act provide, essentially, that an appeal will lie to the Minister who would then give a decision on the facts. Interestingly, the Act makes the decision of the Minister final. Literal meaning of 'finality' supposes that appeals cannot lie from the decision of the Minister to the Courts. Does this then mean that the Court is formally precluded from assuming jurisdiction over appeals from the decision of the Minister? To answer this question correctly, it is pertinent that we examine the provisions of section 42 and 43 of the PVPA.

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[1] Section 29(1) of the PVP Act.
[2] Section 4 of the PVP Act.
[3] Section 35 of the PVP Act.
[4] Section 36 of the PVP Act.

Brief Analysis of Sections 42 & 43 of the PVP Act

Section 42 of the Act is reproduced below for ease of reference [emphasis mine]:

> *"42. (1) An appeal from the decisions of the Registrar made under this Act shall lie to the Minister (of Agriculture).*
> *(2) A person who is aggrieved by any of the decisions of the Registrar may appeal to the Minister by submitting a notice of the appeal within 60 days following the publication, or of the receipt, of the individual notice of such decision by the person whose interest is the source or subject of the appeal.*
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> *43. (1) The Minister:*
> *(a) may conduct an investigation, if he deems necessary to do so, and may hold a hearing of the appeal or make a decision based on written submissions.*
> *(b) may confirm, set aside, or vary any decision or action of the Registrar and may order the Registrar to carry out his decision; and*
> *(c) shall give the reasons for his decision in writing, and copies of the decision shall be given to the appellant, the Registrar, and any other interested party.*
>
> *(2) Subject to the provisions of this section, a decision of the Minister (of Agriculture) shall be final."*

As earlier noted, the tenor of the above provisions is that decisions of the Registrar made lawfully under their powers as bestowed by the Act [5], will lie to the Minister who then gives his decision on the appeal. The provision in **Section 43(2)** which provides explicitly that the decision of the Minister will be final, could either mean one of two things:
(a) that the Minister's decision is final within an administrative context, and
(b) that the Minister's decision is final both as an administrative decision and as a legal decision and as such, will not be the subject of appeal or adjudication before the Court.

The interpretation under paragraph b is popularly referred to as 'Ouster Clauses.'

First, it is important to note that other IP-related laws allow for appeals to the Federal High Court from the decisions of the Registrar. For instance, under the Trademarks Act, appeals from the decisions of the Registrar of Trademarks lie to the Federal High Court. [6] Likewise, under the Patents and Designs Act (PDA), it is expressly provided that any person aggrieved with the decisions of the Registrar in the exercise of his functions under the Act, may appeal to the Federal High Court. [7] Notably, the role of the Minister under the above Acts is restricted to the making of Regulations as seen in the PDA.

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[5] An implication of this is that decisions of the Registrar made ultra vires its powers under the Act could be subject to judicial review
[6] Section 55 of the Trademarks Act.
[7] Section 28(5) of the Patent and Designs Act.

With regards to the first interpretation, there would be no worries as to the jurisdiction of Nigerian courts to decide on disputes since the decision of the Minister would merely be administrative. However, a careful perusal of the Act will inevitably lead to the conclusion that 'administrative finality' was not the intention of the draftsman since there is no evidence of any other provision in the Act addressing which court shall have jurisdiction to try matters arising from the Act. Section 47 which deal with the offences and punishment arising from contravention with the provisions of the Act, was equally silent on which court has jurisdiction to pronounce conviction. The inescapable presumption, therefore, will be that the draftsman intended that the Minister should act as the administrative and judicial head. If the draftsman intended otherwise, then, the draftsman has made a grave omission in the Act. And that omission must be interpreted, sadly, as an ouster clause. Notwithstanding the delay attached to our regular courts, the question remains - are ouster clauses acceptable in the Nigerian jurisprudence?

The Propriety or Otherwise of Ouster Clauses

Ouster clauses are no strangers to the Nigerian jurisprudence; as they were, at some point in Nigeria's post-colonial history, a staple within our Legal System. In fact, as successive military regimes sought to assert their powers, they discovered that it was more expedient to include ouster clauses in promulgated decrees to foreclose judicial supervision.

In the present civilian dispensation, ouster clauses may either be statutorily provided for or constitutionally enshrined. With respect to constitutionally provided ouster clauses, the law is settled that they must be strictly followed. In the case of ***Ugba v. Suswam*** [8], the Supreme Court held that the Court is helpless where the Constitution itself provides for ouster clauses. The jurisdiction of the Court in such cases would then be restricted to construing the clause strictly and giving effect to the ouster clause as provided for in the Constitution. In the case, the Supreme Court reasoned that based on **Section 285(6)** of the 1999 Constitution, the Court of Appeal has no jurisdiction to entertain election petitions beyond 180 days of filing of the petition. Another example of an ouster clause is **Section 188(10)** of the 1999 Constitution which divests the Court of any jurisdiction to entertain any question on the proceedings or determination of the House of Assembly or any matter related to it.

The attitude of Nigerian Courts to statutorily provided ouster clauses is less decisive and has mutated over time. For one, in the military era, successive military regimes established their supremacy by suspending certain protective provisions of the Constitution (e.g., the provisions on fundamental rights); thereby effectively rendering the constitution as constrained by decrees promulgated by the regime. As a result, ouster clauses provided for in decrees were cloaked with the garb of finality. They were strictly followed by the Courts. This was illustrated in the case of **Attorney General (Fed) v. Sode & Ors.** [9] where the Supreme Court held as follows:

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[8] (2014) 14 NWLR (Pt. 1427) 264
[9] (1990) 1 NWLR (Pt. 128) 500

> *"Once a decree is promulgated and that decree excludes the provisions of the Constitution (either by suspension or modification), the decree has the superiority to the exclusion of the Constitution and any other enactment on the subject-matter of the Decree. In this case, as Decrees No.37 of 1968 and No. 10 of 1976 clearly ousted the jurisdiction of the courts in respect of any act done in the forfeiture of assets, all the protective provisions of other laws including the Constitution itself are made irrelevant."*

Owing to the above, in several decisions of the Court on ouster clauses provided by decrees, the Court relieved itself of jurisdiction over the subject matter of the ouster clauses.

It would appear, now, that statutorily provided ouster clauses do not enjoy the same reverence. An essential feature of the civilian dispensation is the supremacy of the Constitution and rule of law. To this end, it is now the attitude of the Court to test the validity of statutorily provided ouster clauses against the overarching provisions of the Constitution. This reasoning was espoused in the *obiter dictum* of Niki Tobi JSC. in the renowned case of ***Inakoju v. Adeleke*** [10] where the eminent jurist opined as follows:

> *"Ouster clauses are generally regarded as antitheses to democracy as the judicial system regards them as unusual and unfriendly. When ouster clauses are provided in statutes, the Courts invoke section 6 as barometer to police their constitutionality or constitutionalism."***(@pp. 597, paras E-H)**

The relevant portion of Section 6 of the Constitution is subsection (6)(b) which provides that the judicial powers of the Courts:

> *"…. shall extend, to all matters between persons, or between government or authority and to any persons in Nigeria, and to all actions and proceedings relating thereto, for the determination of any question as to the civil rights and obligations of that person"*

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[10] (2007) 4 NWLR (Pt. 1025) 441

On the face of it, it may then be argued, in line with the obiter dictum in Inakoju's case that the general judicial powers of the Court as constitutionally provided for in Section 6(6)(b) supra may be used to preserve the jurisdiction of the Court notwithstanding any statutorily provided ouster clause. Again, when interpreted broadly, the said obiter emphasizes the supremacy of the Constitution over Acts of the National Assembly; and recommends that statutorily provided ouster clauses are only valid where they are consistent with the Constitution.

The Court of Appeal toed the above route in the case of *Jimoh v. Olawoye*. [11] In that case, the Court concluded that the provisions of Section 26(10) of the Kwara of the Local Government Law of Kwara State, 1999 seeking to oust the jurisdiction of the Court from determining matters relating to the removal from office of a Local Government Chairman, was unconstitutional and therefore void. In the words of Onnoghen JCA:

> *"Looking closely at the provisions of Sections 4(8) and 272(1) of the 1999 Constitution, it is clear that Section 26(10) of Law No. 6 of 1999 seeks to oust the jurisdiction of the Law Courts in relation to the removal or the impeachment of a Chairman of a Local Government and is to that extent unconstitutional…."*

For context, Section 4(8) of the 1999 constitution provides that:

> *"Save as otherwise provided by this Constitution, the exercise of legislative powers by the National Assembly or by a House of Assembly shall be subject to the jurisdiction of courts of law and of judicial tribunals established by law, and accordingly, the National Assembly or a House of Assembly shall not enact any law, that ousts or purports to oust the jurisdiction of a court of law or of a judicial tribunal established by law."*

Hence, it may be safe to conclude that in the light of **Section 4(8)** of the constitution as well as recent decisions of the Court recognising the supremacy of the Constitution over statutory provisions, statutorily provided ouster clauses are unconstitutional and therefore void because the Constitution prohibits the legislature from enacting any law which ousts or purports to oust the jurisdiction of a Court of law.

What then is the fate of Section 43(2) of the PVP Act?

The Validity or Otherwise of Section 43(2) of the PVP Act.

Since the legitimacy of Section 43(2) of the PVP Act is tethered to its consistency with the Constitution, it is safe to say that in specific situations, the operation of the appeal procedure provided under both sections may fall short of this salient requirement for validity and will therefore be void to the extent of its inconsistency.

One of such situations could arise from **Section 26(4)** of the PVPA which empowers the minister to reply to any objections made to the Registrar against the Federal Government's application for breeder's rights.

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[11] (2003) 10 NWLR (Pt. 828) 318

If the Minister decides to carry out this duty, and the Registrar gives a decision on the same objection, where exactly would an appeal lie? It is unacceptable in law for the Minister to sit over an appeal from a decision of the Registrar to which it was a party.

That will constitute an infraction of the quintessential principle of Nemo Judex in Causa Sua which is guaranteed under the right to fair hearing as provided in Section 36(1) of the 1999 Constitution.

Indeed, the provisions of Section 43(2) of the PVP Act would be unable to restrain the Court from assuming jurisdiction over an appeal from the decision of the Minister as it is inconsistent with the provisions of Section 36(1) of the Constitution. This simply means that nothing will preclude a party to a dispute under the PVP Act from going to court to redress a wrong. In that light, we can say section 43(2) is not inimical to the PVP Act.
Further, in the light of recent judicial decisions, and upon considering constitutional provisions like Sections 4(8) and 6(6)(b) of the 1999 constitution, one may predict with near certainty that if the legitimacy of Section 43(2) of the PVP Act becomes sub judice, the Court will not strip itself of jurisdiction as it will find the same provision to be unconstitutional and ultra vires the powers of the Legislature.

Conclusion and Recommendation

The passing of the Plant Protection Variety Act heralds' numerous opportunities in the agricultural sector as plant breeders can commercialise their intellectual property by assigning or authorising any activity in relation to any registered plant variety. This also opens investment opportunities for investors seeking to explore this aspect of agriculture and further create job opportunities for people skilled in agriculture.

This development would serve as a catalyst in the agricultural sector to enable high yield by stakeholders in the sector and to further result in massive contribution to Nigeria's GDP. [12] However, the Registrar is expected to make guidelines for the effective implementation of the Act, it is hoped that the guidelines will be published soon.

The PVP Act has and should garner positive reception among players in the Agro-based Sector. Industry regulators and experts believe that the Act has the potential to catalyse local and foreign investments into the country's Agric Sector. It is also predicted that the introduction of breeder's rights could translate into an increase seed production and exports, and food production within the Country.

However, with the expected bump in commercial activities within the industry, the Registrar's decision-making powers may be challenged by dissatisfied right holders and applicants who are affected by said decisions. From the provisions of the 1999 constitution and various judicial decisions, it is obvious that the current appeal procedure does not hold much legal weight capable of effectively deciding on the rights of affected parties.

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[12] Agriculture contributed 21.42% to nominal GDP in the first quarter of 2021. See Nigerian Gross Domestic Product Report (Q1 2021)

While an argument may be made that Section 43(2) presents a business-friendly channel through which parties may quickly resolve appeals from the decisions of the Registrar by foreclosing the cumbersome and lengthy litigation proceedings; the reality remains that this option is unconstitutional and cannot effectively stop parties from exploring appeals to court in the event where necessary. Unfortunately, it is likely that parties would spend months to years in Court, debating preliminary objections on the invalidity of the appeal to the Court from the decision of the Minister which is final by virtue of Section 43(2) of the Act.

In any case, the office of the Minister is not especially suited to the resolution of disputes and the determination of civil rights and duties of parties regardless of the bottlenecks associated with litigation.

To prevent this challenge, it is therefore our considered opinion that this provision is amended to expressly include appeals to the Court from the decision of the Registrar in lieu of appeals to the Minister. This ensures that such disputes are brought to the right forum which could then boost stakeholder confidence in the dispute resolution mechanism established by the Act. As an alternative, the Act could be amended to create an Arbitration Tribunal to which appeals from the decision of the Registrar would lie. Of course, further Appeals from the decision of the Tribunal would lie to the Court in accordance with the provisions of the Constitution.

Pending when the recommendation in the preceding paragraph is executed, it is recommended that the Minister should instantly and in consultation with the Director general and the Registrar, promulgate the Regulation as required by the Act. The Regulation should contain a part for dispute resolution procedures. The Regulation should state that appeals from the final decision of the Minister lie to the Federal High Court in accordance with the Constitution. It is submitted that the Minister has the power to so state since the Act in its present state has made the Minister the final arbiter on such issues. This temporal mechanism will allow a smooth running of the PVP Act relating to disputes, pending when the Legislature amends the PVP Act.

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