

GARNISHEE PROCEEDINGS: A CRITICAL ANALYSIS OF THE LAW AND PRACTICE IN NIGERIA¹ – by Alexander A. Wodi © edited March 5, 2020.

1.0 INTRODUCTION

Garnishee proceedings are a mode of enforcement of money judgments.² It is a process where a judgment creditor owed money by a judgment debtor obtains an order of court to attach a debt owed to the judgment debtor by a third party, known as a garnishee, within the jurisdiction of the court to satisfy a judgment debt.³ Eko JSC in *GTB v. Innoson Nigeria Ltd*⁴ put it more succinctly, “It is a process of enforcing a money judgment by seizure or attachment of the debts due or accruing to the judgment debtor which forms part of his property available for execution.”

The aim of this paper is to examine the practice and procedure of garnishee proceedings in Nigeria, with a view to determining its effectiveness and efficiency, identify issues and challenges arising from it, proffer solutions to perceived problems and make suggestions for reform of the law and practice where applicable.

This research was prompted by the perceived dearth of scholarship in this area of the law.⁵ In the course of gathering materials for the research, it was discovered

¹ This paper was written as a synopsis of my LLM Thesis in preparation for the Internal Departmental Defence of my Master of Laws Thesis in May 2010. Some of the references are dated but the issues still remain very relevant. I have tried to include more recent cases and references for further reading and research in the bibliography as at March 5, 2020. The intention is to expand and discuss extensively the issues contained herein in my upcoming book on the subject matter. I bid you happy reading.

² Other methods of enforcement of judgment include writ of *fifa*, judgment summons and sequestration.

³ *Re: Diamond Bank Ltd*³ (2002) 17 NWLR (Pt. 795) 120 at p. 133, *paras.* B-H, *per* Justice Aderemi J.C.A.

⁴ (2017) LPELR 42368 (SC) at pp. 8 – 11, *paras.* F – C.

⁵ The CBN Banking reforms of 2004/2005 and 2008/2009, as well as the introduction of the TSA during the President Goodluck Jonathan administration 2011-2015 witnessed an explosion of garnishee proceedings against DMBs and the CBN in a bid to attach funds of the Federal Government and its agencies. This in turn sparked some interest in the subject matter by lawyers and their clients. It is believed that the recent dribble of articles on the subject would soon achieve a generous flow of scholarly works and materials.

that the law and practice of garnishee proceedings in Nigeria is primarily based on judicial interpretation of the relevant provisions of the Sheriffs and Civil Process Act⁶ (SCPA) and the Judgments (Enforcement) Rules (JER).

The paper is divided into five parts. The first part introduces the topic. It identifies some major terms commonly used in garnishee proceedings. Also the applicable law which governs garnishee proceedings in Nigeria, which is, the Sheriffs and Civil Process Act (SCPA) and the Judgments (Enforcement) Rules (JER) made pursuant to section 94 of the SCPA, is examined.

Part two examines the nature of garnishee proceedings by trying to distinguish garnishee proceedings from other methods of enforcement of money judgment like writ of *fifa*, a charging order, a writ of sequestration and an order of committal on a judgment debtor's summons.

In part three the practice and procedure involved in garnishee proceedings is highlighted by looking at the two major stages of the proceedings, namely the order *nisi* and order absolute.

In part four some of the legal issues that may arise in the practice and procedure of garnishee proceedings in Nigeria are also discussed. These issues include: jurisdiction; service; Attorney General's consent under section 84 of the SCPA; attachable funds; and proper parties to garnishee proceedings.

Part five concludes the paper with recommendations and suggestions for reform in

⁶ Cap. S6, *Laws of the Federation of Nigeria, 2004*. The original Act was passed on June 1, 1945 and has remained virtually unchanged since then. Definitely long overdue for review and amendment.

the law and practice of garnishee proceedings in Nigeria.

1.1 DEFINITION OF TERMS

1. **Garnishee** - Is a Norman-French word which means to “furnish”. It denotes a third party who is indebted to the judgment debtor or has custody of his money and who at the instance of the judgment creditor is called upon to pay the judgment debt from his indebtedness to the judgment debtor or from the credit of the judgment debtor in his account with the third party.⁷

2. **Garnishor** – Is a creditor who initiates garnishee proceedings to reach the debtor’s property that is thought to be held or owed by a third party.⁸

3. **Judgment Creditor** – Is a person having a legal right to enforce execution of a judgment for a specific sum of money.⁹ This is usually a person in whose favour a court a money judgment. The Garnishor and Judgment Creditor are one and the same.

4. **Judgment Debtor** – Is a person against whom a money judgment has been entered but not yet satisfied. His default in compliance with the judgment gives rise to the garnishee proceedings.

5. **Order Nisi** – Is a conditional order which is temporarily granted until such a time, usually specified by the court, within which the person against whom the order *nisi* is made shows cause why the order should not be made absolute or final. The term Order *nisi* (decree nisi or rule nisi) derives its roots from the latin word *nisi*, meaning “unless”. Thus an Order *nisi* is a temporary court order that will become final or come into force at a future date unless a particular condition is met. In the case of garnishee proceedings such condition may entail payment of the

⁷ *Contract Resources v. STB* (2001) 6 NWLR (Pt. 708) 115, at p.123, *paras.* G-H, *per* Olagunju JCA.

⁸ Garner, B.A. (ed.) (2004) *Black’s Law Dictionary*, 8th ed., Thomson West, USA, p. 721.

⁹ Garner, B.A., *op. cit.*, p. 861.

judgment debt or filing an Affidavit to Show Cause¹⁰ why the order should not be made absolute.

6. **Order Absolute** - Is an order *nisi* that has become complete and unconditional following the failure of the person against whom the order *nisi* was made to show cause why the order should not be made absolute.

1.2 THE LAW APPLICABLE TO GARNISHEE PROCEEDINGS

In Nigeria the principal legislation applicable to the enforcement of judgments is the Sheriffs and Civil Process Act¹¹ (SCPA); and the Judgments (Enforcement) Rules (JER) made pursuant to section 94. The SCPA is a federal enactment and provides for enforcement of judgments throughout the Federation of Nigeria.

The SCPA is divided into seven parts, each dealing with specific aspects of enforcement of judgments and orders. However, for our purpose our focus would be on Part V of the SCPA which deals with **attachment of debts by garnishee order**. Part V comprises sections, 83 - 92. We shall equally examine Order VIII of the judgments (Enforcement) Rules (JER) which also deals with garnishee proceedings. There are also some Forms in the First Schedule of the SCPA which apply to garnishee proceedings, namely: Form 25 which specifies the contents of the affidavit in support of the garnishee order; Form 26 which specifies the form of the garnishee order; and Form 27 which specifies the form of the writ of execution against the garnishee under section 86 of the SCPA.

Order 37 of the Federal High Court (Civil Procedure) Rules 2009¹² also provides for garnishee proceedings brought before the Federal High Court. This is not

¹⁰ The purport of the Affidavit is usually to provide satisfactory evidence or argument that the order should not be made absolute or final.

¹¹ Cap. S6, *Laws of the Federation of Nigeria*, 2004.

¹² The new Federal High Court (Civil Procedure) Rules came into effect on April 30, 2009.

unusual as it is in line with section 254 of the 1999 Constitution which empowers the Chief Judge of the Federal High Court, subject to the provisions of any Act of the National Assembly, to make rules regulating the practice and procedure of the Federal High Court.¹³

2.0 GARNISHEE PROCEEDINGS

Garnishee proceedings are a mode of enforcement of judgment. Every judgment of court ought to be obeyed until it is set aside or declared a nullity. It has been observed that Courts of competent jurisdiction jealously guard their judgments and, therefore, provide adequate protection to such judgments so that the successful litigant is not deprived of the fruits of the judgment unless there is strong reason to do so.¹⁴ It is submitted that this is in line with section 287 of the 1999 Constitution of the Federal republic of Nigeria which provides that the judgments of the Supreme Court; Court of Appeal; Federal High Court, State High Courts and all other courts established by the Constitution shall be enforced in any part of the federation by all authorities and persons and by courts of subordinate jurisdiction.

2.1 THE NATURE OF GARNISHEE PROCEEDINGS

Garnishee proceedings are a method of enforcement of judgments for the payment of a specific sum of money. A money judgment or award is an enforceable judgment, which is enforceable by garnishee proceedings as well as other methods, namely: a writ of *fieri facias*, a charging order, a writ of sequestration or an order of committal on a judgment debtor's summons.¹⁵ These shall now be discussed briefly below before proceeding to examine the nature of garnishee proceedings:

- a. The **writ of *fieri facias*** also known as writ of *fifa* or writ of execution is

¹³ It should be noted that the provisions of the rules in Order 37 are virtually the same with those in the SCPA.

¹⁴ Ojukwu, E. & Ojukwu, C.N., (2002) *Introduction to Civil Procedure*, Helen-Roberts, Nigeria, p. 261.

¹⁵ *Govt. of Gongola State v. Tukur* (1989) 4 NWLR (Pt. 117) p. 592.

directed at goods, chattel or immovable property of the judgment debtor that could be seized and sold to realise money to satisfy the judgment debt, while a garnishee proceedings is directed at money in the hands of a third party due or accruing to the judgment debtor.

- b. The *Black's Law Dictionary* defines a “**charge**” as “an encumbrance, lien or claim over property.”¹⁶ The implication of a charge is that a particular debt is to be discharge from a particular fund or property. A charging order imposes the liability to pay a debt owed under a judgment from a particular property. It expands the options of the judgment creditor for satisfaction of the judgment debt by including to the list of options, property or funds that may be charged for payment of the debt, unlike garnishee proceedings which focuses only on money in the hands of a third party and thereby limiting the option of the judgment creditor.
- c. **Sequestration** is a legal process consisting of the temporary deprivation of a person of his property.¹⁷ Section 82 of SCPA and Order XI Rules 8 and 9 of the JER provide for the enforcement of judgments or orders through the issuance of a writ of sequestration. The writ is directed against both movable and immovable property including chose in action unlike in garnishee proceedings which is directed against the garnishee and the money in his custody and control belonging to the judgment debtor.
- d. The **judgment summons** is a process used to procure the committal of a judgment debtor.¹⁸ The summons, which is issued upon the application of the judgment creditor, requires the judgment debtor to appear and be examined on oath as to his means.¹⁹ Part IV of the SCPA, particularly,

¹⁶ *Op. cit.*, p. 248.

¹⁷ Burke, J., (1976) *Osborn's Concise Law Dictionary*, 6th ed., Sweet & Maxwell, London, p. 303.

¹⁸ *Ibid*, p. 187.

¹⁹ Saunders, J.B. (1989) *Words and Phrases Legally Defined*, 3rd ed., Vol. 2: D-J, Butterworth, London, p. 496.

sections 55, 58, 60 and 65, provides for enforcement of judgment through judgment summons. It differs from garnishee proceeding in that a failure to appear in court to dispute liability may be taken to be an admittance of liability and result in the issuance of a warrant of arrest while in garnishee proceedings such failure to appear in court after service of the order *nisi* would result in the order being made absolute.

The nature of garnishee proceedings is that it involves an application by the judgment creditor to the court for an order *nisi* which if granted binds the money in the hands of the garnishee who is directed to show cause why the order should not be made absolute.²⁰ Where the garnishee fails to show cause the order is made absolute. In which case, the garnishee is expected to pay the judgment debt to the judgment creditor in compliance with the order absolute.²¹ The garnishee by failing to comply with the order absolute risks the judgment creditor levying execution on his property by taking out a writ of *fifa* or being committed to prison if found guilty of contempt after issuance of Forms 48 and 49.²²

For garnishee proceedings to lie or to be commenced there must be money owned by the judgment debtor in the possession of the garnishee that could be attached for the benefit of the judgment creditor.²³ Thus the garnishee must be indebted to the judgment debtor or have money in his custody standing to the credit of the account of the judgment debtor. The debt must be a present and existing one for it to be attachable.²⁴ The real test as to whether a debt is attachable is whether at the time of service of the order *nisi* on the garnishee any debt is due and whether it is a debt

²⁰ ss. 83 and 85 SCPA. See also Or. 8 rr. 2 and 3 JER.

²¹ s. 86 SCPA.

²² ss. 66 and 72 SCPA. See also Or. 9 r. 13 JER.

²³ *U.B.A. Ltd v. S.G.B. Ltd* (1996) 10 NWLR (Pt. 478) 381, at p. 389, *paras.* F-G, per Uwaifo JCA.

²⁴ Nwadialo, F. (2000) *Civil Procedure in Nigeria*, 2nd ed., University of Lagos Press, Lagos, pp. 965- 967.

of which the judgment debtor can enforce payment if he desires to do so.²⁵ Likewise, the garnishee must also be within jurisdiction of the court before which the garnishee proceedings are brought.²⁶ Garnishee proceeding envisages three parties to it, namely: the judgment creditor (the garnishor); the judgment debtor; and the garnishee.²⁷ The consequence of service of the order *nisi* on the garnishee is to bind in his hands the money standing to the credit of the judgment debtor who is himself the creditor of the garnishee. Thus, service of the order *nisi* turns the garnishee into a custodian of the attached funds for the benefit of the judgment debtor.²⁸ When a garnishee order is served on a garnishee it becomes obligatory not to release the money attached. This obligation supersedes the garnishee's duty to repay the judgment debtor the amount of money due to him.²⁹

3.0 THE PRACTICE AND PROCEDURE OF GARNISHEE PROCEEDING IN NIGERIA

Applications for garnishee proceedings are made to the court by the judgment creditor and the orders of the court shall come in two steps, namely: the order *nisi* and the order *absolute*.³⁰

3.1 ORDER NISI

The garnishee order *nisi* is one of two primary orders (the other one being the order *absolute*) involved in garnishee proceedings. An order *nisi* is a conditional or

²⁵ In the case of *Webb v. Stenton* (1883) 11 QBD 518 a judgment debtor was entitled to an income for life from a fund vested in trustees, payable in February and August. In November the judgment creditor sought to attach the said income by garnishee proceedings. It was held that there was no debt owing or accruing at the time when the order was applied for which could be attached. See also Obi-Okoye, A. (1997) *Essays on Civil Proceedings*, Ministry of Justice, Anambra State, p.65- 66.

²⁶ *Sokoto Govt. v. Kamdax (Nig.) Ltd* (2004) 9 NWLR (Pt. 878) 345 at p. 376, *paras.* F-G; 380-381, *paras.* H-A.

²⁷ *Ibid.* at p. 380, *paras.* C-E. See also Nwamara, T.A. (2007) *The Law of Execution of Judgments*, 1st ed., Law and Educational Publishers Ltd, Aba, Nigeria, pp. 222-223.

²⁸ *Ibid.*

²⁹ Babalola, A. (2003) *Enforcement of Judgments*, 1st ed., Afe Babalola, Ibadan, p. 93.

³⁰ *Union Bank of Nigeria Plc v. Boney Marcus* (2005) 13 NWLR (Pt. 943) 654.

temporary order that would not take effect unless the person affected by it or against whom it is made appears in court within a certain time to sufficiently show cause or reason why it should not take effect. Section 83(1) of the Sheriffs and Civil Process Act³¹ (SCPA), provides that garnishee proceedings may be commenced by an *ex parte* application brought by the judgment creditor supported by an affidavit showing:

1. that the judgment creditor had obtained a judgment against the judgment debtor for the recovery or payment of money;
2. that the judgment is still unsatisfied and to what amount; and
3. that any other person, called a garnishee, is indebted to the judgment debtor and is within jurisdiction.

Upon these conditions³² being met the court may issue an order *nisi* that the debt owing from the garnishee to the judgment debtor shall be attached to satisfy the judgment together with costs of the garnishee proceedings. The same order *nisi* or a subsequent order shall order the garnishee to appear before the court to show cause why he should not pay the judgment sum together with costs.

Order 8 rule 3 of the Judgments (Enforcement) Rules (JER) provides that the affidavit shall be in the prescribed format in “Form 25” which is contained in the First Schedule. The rule also provides that a certified copy of the judgment may be included if the application is taken in a court different from the court that delivered the judgment which the judgment creditor seeks to enforce.

Section 83(2) of the SCPA provides that both the judgment debtor and the garnishee must be served with the order *nisi* at least fourteen days before the return date for hearing. Service is fundamental. It is a prerequisite for a court assuming

³¹ Cap. S6, *Laws of the Federation of Nigeria*, 2004.

³² Which are captured in Form 25 of the First Schedule of the SCPA.

jurisdiction. The Supreme Court recently held in the case of *Drexel Energy & 2 Ors v. Trans International Bank Ltd & 2 Ors*³³ that failure to serve originating process as required by the Rules of Court and the Sheriffs and Civil Process Act is a defect which raises the issue of fair hearing, which is fundamental for the exercise of the court's jurisdiction.³⁴

Section 85 of the SCPA provides that the effect of service of the order nisi is to bind the debt in the hands of the garnishee. Once a garnishee order *nisi* has been made in respect of a judgment debtor's money kept in a garnishee's possession, then the garnishee must refrain from dealing in any way with such money until it has shown cause as required by the law and until the order has either been made absolute or discharged.³⁵ In the case of *FMBN Ltd v. Desire Gallery Ltd*³⁶ in which the garnishee paid out money after service of the order *nisi* it was held that by virtue of section 92 SCPA any payment of money by the garnishee without leave of court after being served with the garnishee order *nisi* is null and void. Service of the order *nisi* on the garnishee attaches the alleged debt and any payment thereafter to the judgment debtor shall be null and void.³⁷ But if before service the garnishee *bona fide* pays the debt to the judgment debtor, the attachment is inoperative as there is no longer any debt to be attached.³⁸

Section 84 of the SCPA provides that where the money sought to be attached is in the custody or under the control of a public officer in his official capacity or in custody of the court then the relevant consent from the appropriate officer must be

³³ (2008) 12 SC (Pt. II) 240.

³⁴ *Ibid.*, at p. 256, *per* Muntaka-Coomassie JSC.

³⁵ *CBN v. Kraus Thompson Org. Ltd* (2002) 7 NWLR (Pt. 765) 139 at p. 154, *paras.* C-D.

³⁶ (2004) 13 NWLR (Pt. 891) 522 at 541-542, *paras.* B-D; A-C.

³⁷ Obi-Okoye, A., *op. cit.*, p. 68.

³⁸ *Ibid.*

obtained before the order *nisi* can be granted by the court. The “appropriate officer” referred to being the Attorney General of the Federation or Attorney General of a State depending on whether the public officer is in the public service of the Federation or of a State respectively.³⁹ Where the money is in *custodia legis* (i.e. custody of the court) the leave of the court is necessary for the same order. The term “public officer” as used in section 84 has a restrictive meaning and only applies to a public officer who holds a public office in the public service of the Federation or of a State. In the case of *Barclays Bank, D.C.O. v. Baderinwa: Re L.E.D.B.*⁴⁰ it was held that the Lagos Executive Development Board (LEDB), a statutory corporation, does not qualify as a public officer for purposes of section 84 of the SCPA.⁴¹

3.2 ORDER ABSOLUTE

Where, on the return date, the garnishee does not attend court or does not dispute the debt claimed to be due from him to the judgment debtor, the court may make a garnishee order *nisi* absolute. By which the garnishee is ordered to pay to the judgment creditor the amount of debt due from him to the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt together with the costs of the

³⁹ s. 84 (3) SCPA.

⁴⁰ (1962) 2 All NLR 731.

⁴¹ See also *CBN v. Hydro Air Pty Ltd* (2014) 16 NWLR (Pt. 1434) 482 at 521 -522; and *Ibrahim v. J.S.C.* (1998) 14 NWLR (Pt. 584) 1 per Iguh, JSC decisions wherein the definition of the term “public officer” was equated with “public department” and includes every officer or department invested with the performance of public duties, contrary to *C.B.N. v. Njamenze* (2015) 4 NWLR (Pt. 1449) 276 where the court held that CBN is not a public officer for the purpose of garnishee proceedings. The court per Agbo JCA queried thus: The question to ask then is: is the CBN an officer or institution and what is its function in respect of this money of the federation that is in its custody? The Court of Appeal in *C.B.N. v. Interstella Comms. Ltd.* (2015) 8 NWLR (Pt. 1462) 456 also gave a restrictive interpretation of the term “public officer” when it held that, “the term ‘public officer’ relates to the holders of the office as reflected only in section 318(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). The provision of section 84 of the Sheriffs and Civil Process Act also refer to a public officer as a holder, officer or person holding a public office... while officers of the Central Bank of Nigeria are public officers, it is unacceptable to classify Central Bank of Nigeria as a public officer, because it acts as a banker to the Federal Government in respect of credit balances in the accounts of the Federal Government of Nigeria.” This is discussed more extensively my upcoming Book.

garnishee proceedings.⁴² The order absolute may be enforced in the same manner as any other order for the payment of money, namely by a writ of *fifa*, a charging order, a writ of sequestration, an order of committal on a judgment debtor's summons, including garnishee proceedings against the garnishee's debtor⁴³. A garnishee against whom an order absolute is made automatically becomes a judgment debtor and the judgment debt is recoverable by garnishee proceedings if he fails to pay the garnisheed sum.⁴⁴

The granting of a garnishee order absolute is discretionary. A garnishee order *nisi* would not be made absolute where there is doubt as to the ownership of the debt attached.⁴⁵ Likewise an order absolute made on a mutual mistake by the garnishee and judgment creditor may be set aside on application.⁴⁶ A garnishee order absolute is not interlocutory; it is a final decision of the court. Once the order absolute is made the court would be *functus officio*⁴⁷, the only way by which the garnishee can express dissatisfaction with the order of the court is to appeal against it.⁴⁸ A Garnishee (now Judgment Debtor) who fails to comply with a garnishee order absolute without good reason despite the fact that he has the means to do so may be served with Forms 48⁴⁹ and 49⁵⁰. Thus the Judgment Debtor/Garnishee

⁴² Afe Babalola, *op. cit.*, p. 106; See also Nwamara, T.A., *op. cit.*, p. 258.

⁴³ Obi –Okoye, A., *op. cit.*, p. 71.

⁴⁴ In the case of *Ifeanyichukwu Okonkwo v. Zenith Bank Plc. & CBN* (Unreported Suit No. FHC/EN/CS/39/07) Zenith Bank failed to pay a judgment debt in an earlier case (*Ifeanyichukwu Okonkwo v. Govt. Anambra State & Zenith Bank Plc*, unreported Suit No. FHC/EN/CS/173/06) and became the Judgment Debtor with CBN as the garnishee in the instant case.

⁴⁵ In the case of *Barclays Bank DCO v. Baderinwa: re LEDB* (1962) 2 All NLR 731 the court had to order an inquiry to determine ownership of the debt due to Baderinwa from LEDB as it was contended that the funds in the hands of LEDB belonged to him jointly with three other members of his family.

⁴⁶ In the case of *Moore v. Peachey* (1892) 8 TLR 406 a bank had a customer named Frederick Peachey, whereas the garnishee order issued against the bank bore the name Henry Frederick Peachey. It was held that the judgment creditor could not retain the money paid to him by the bank under the mistaken belief that the order applied to its customer.

⁴⁷ *UBN Plc. v. Boney Marcus Ind. Ltd* (2005) 13 NWLR (Pt. 943) 654 at pp. 665 *para. A*; 667 *paras. B-D*.

⁴⁸ *In re: Diamond Bank Ltd* (2002) 17 NWLR (Pt. 795) 120 at pp. 134-135, *paras. G-A*.

⁴⁹ Notice of Consequences of Disobedience to Order of Court.

⁵⁰ Notice to Show Cause Why Order of Committal Should Not be Made, respectively.

may be cited for contempt and if found guilty the Judgment Debtor/Garnishee risks being committed to prison.

3.3 A COMPARATIVE ANALYSIS OF THE PRACTICE AND PROCEDURE IN OTHER JURISDICTIONS

3.3.1 United Kingdom (U.K.)

The law relating to garnishee proceedings in the U.K. was reviewed recently⁵¹ with the passing of the new Civil Procedure Rules 1998 (CPR), more particularly the current Part 72 of the Civil Procedure Rules 1998⁵² as the law governing garnishee proceedings in England. In England the practice and procedure of garnishee proceedings is similar to that in Nigeria.

The procedure entails obtaining “third party debt orders” under Part 72 of the CPR. Under the new regime both the “judgment creditor” and “judgment debtor” are still referred to as such, but the “garnishee” is now referred to as “the third party”. The “garnishee order *nisi*” is now known as “the interim third party debt order” and it is made “final” as opposed to “absolute” under the old English regime as well as that of Nigeria. The “garnishee order absolute” thus became what is now called “a final third party debt order”. However, the procedure like the time tested principles of garnishee proceedings remain basically the same. The High Court Queens Bench recently decided a case under Part 72 involving the CBN. In the case of *Juliet Azuka Henry v. NAL, FBN and CBN*⁵³ the High Court of the Queen’s Bench

⁵¹ Recent in view of the fact that the SCPA has remained neither reviewed nor amended in over seven decades.

⁵² (Entitled, "Third Party Debt Orders") which came into effect on 25 March 2002 and in effect replaced the 1965 English Rules of the Supreme Court (RSC) Order 49.

⁵³ Unreported Case No. HQ03X00866 judgment delivered on 15/07/2008.

refused to make an interim third party order final on ground of failure to make a material disclosure and sovereign immunity raised by the garnishee. In that case the judgment creditor sought to attach a foreign account known as the Bilateral Air Services Account (BASA) account opened by the Central Bank of Nigeria (CBN) with First Bank of Nigeria (UK) Ltd (FBN), on the erroneous belief that the account belonged to the defunct Nigerian Airways Ltd (NAL). The court was of the view that the funds did not qualify as a “debt due” under CPR Rule 72.2(1)(a) since the BASA account was maintained by FBN on behalf of CBN and not NAL. The Judgment creditor also failed to disclose in her application for the interim third party order that there was a pending suit at the Federal High Court in Nigeria in which the ownership of the BASA account funds was a subject for determination. This was held to be a material non-disclosure. Also by virtue of sections 13 and 14 of the UK Sovereign Immunities Act (SIA) 1978 the property of a foreign sovereign and its agencies shall not be subject to any process for enforcement of a judgment. The BASA account funds were held to be “property” of the CBN and therefore immune from attachment for the satisfaction of a judgment by virtue of the SIA.

The only difference worthy of note, aside from the change in terminology, is that the return date for hearing under Part 72 of the CPR, which is not less than 28 days after the interim third party debt order is made⁵⁴, while under the SCPA the order *nisi* must be served on the garnishee and judgment debtor at least fourteen days before the day fixed for hearing⁵⁵.

⁵⁴ Part 72.4(5) CPR

⁵⁵ s.83(2) SCPA.

3.3.2 United States of America (U.S.A.)

In the U.S.A a judgment for payment of money may be enforced through a process referred to as “garnishment” which is another term for garnishee proceedings. A garnishment is a means of collecting a monetary judgment against a defendant by ordering a third party (the garnishee) to pay money, otherwise owed to the defendant, directly to the plaintiff. In the case of *Kokoszka v. Belford*⁵⁶ the US Supreme Court defined “garnishment” as any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt.⁵⁷ The US Federal Civil Procedure Rules 2007(FCPR)⁵⁸ and the United States Code (USC)⁵⁹ recognize garnishment as a mode of recovering a judgment.

Title 28 of the United States Code (USC) can be said to be the American equivalent of Part V of the Sheriffs and Civil Process Act (SCPA) and Order VIII of the Judgments (Enforcement) Rules (JER) which govern garnishee proceedings. Upon reading the provisions of Title 28 of the USC *vis-a-vis* that of Part V of the SCPA and Order VIII of the JER, the similarities as well as the differences between the laws from the two jurisdictions (viz: US and Nigeria) are immediately discernible. Under section 83(1) of the SCPA the judgment creditor may bring an *ex parte* application for an order *nisi*, while under Title 28, section 3205 (1) the judgment creditor may apply for a writ of garnishment. Under section 83(2) both the judgment debtor and garnishee must be served at least 14 days before the day of hearing or return date, meaning that the garnishee must show cause why the debt

⁵⁶ 417 US 642 (1974).

⁵⁷ 417 US 652.

⁵⁸ These rules govern the conduct of all civil actions brought in Federal district courts. While they do not apply to suits in state courts, the rules of many states have been closely modeled on these provisions.

⁵⁹ The USC is a compilation and codification of the general and permanent federal law of the United States. Its Nigerian equivalent is the Laws of the Federation of Nigeria (LFN). The Code is divided into 50 “titles” which are akin to printed “volumes”. Title 28 governs procedure in the United States federal courts.

should not be attached within 14 days from the date of service. But under Title 28, section 3205(2)(E) the garnishee is expected to answer the writ within 10 days of service of the writ. Under both laws service of the writ or order *nisi* shall be on both the garnishee and judgment debtor and the garnishee is given a time frame within which to dispute or comply with the writ or order *nisi*, however the American law by virtue of Title 28, section 3205(5) affords the judgment debtor an opportunity to object to the answer to the writ within 20 days of receipt of the garnishee's answer to the writ of garnishment. Such objection would be in writing and the judgment debtor may request a hearing, which shall be held by the court within 10 days of the request or as soon as is practicable. This is different from the practice in Nigeria where some courts have gone as far as holding that the judgment debtor is not a necessary party in garnishee proceedings, which in the opinion of such courts is strictly between the garnishee and judgment creditor.⁶⁰ Garnishment under Title 28 is of a continuing nature and will only terminate through a court order, exhaustion of the property in possession of the garnishee or satisfaction of the debt.⁶¹ This makes it amenable to wage garnishment as well as attachment of earnings, unlike garnishee proceedings under the SCPA and JER which are primarily geared towards a one-off settlement of a debt.

4.0 ISSUES ARISING IN THE PRACTICE AND PROCEDURE OF GARNISHEE PROCEEDING IN NIGERIA

In the practice and procedure of garnishee proceedings in Nigeria a number of issues arise, some of these include: jurisdiction; consent under section 84 of the

⁶⁰ In *Re: Diamond Bank Ltd* (2002) 17 NWLR (Pt.795) 120 CA; *PPMC Ltd v. Delphic Pet. Inc.* (2005) 8 NWLR (Pt.928) 144 CA. See also *UBA v. Ekanem* (2010) 6 NWLR (Pt. 1190) 207; & *Nigerian Breweries Plc. v. Dumuje* (2016) 8 NWLR (Pt. 1515) 536 also CA decisions. The “judgment debtor” has variously been described as a “busy body” and “meddlesome interloper” by the Court of Appeal.

⁶¹ See Title 28, s. 3205(10) (c) USC.

SCPA; proper parties; service; attachable funds; and appeals and interlocutory applications. Same are highlighted and discussed⁶² below:

4.1 Jurisdiction – We noted that in determining jurisdiction the court must consider both the parties in litigation as well as the subject matter.⁶³ The law governing garnishee proceedings tries to resolve the issue of jurisdiction by providing that garnishee proceedings may be taken before the same court that delivered the judgment sought to be enforced or in any court where the judgment debtor could have sued the garnishee for the recovery of the debt.⁶⁴ The second leg of this provision is difficult to follow because no specific court is mentioned therefore recourse has to be had to the rules of court and the provisions of the Constitution.

4.2 Consent under section 84 of the SCPA - Section 84 of the SCPA provides that where money in the custody or control of a public officer, in his official capacity, is liable to be attached by garnishee proceedings the consent of the appropriate officer⁶⁵ must first be obtained. We also looked at the constitutionality and applicability of section 84 of the SCPA to natural and artificial persons.⁶⁶ We concluded that the term “public officer” is used restrictively in section 84 and refers only to **natural persons who hold public office in the public service of the Federation or of a State**. A statutory corporation, Ministry, Government Department or Agency does not qualify as a public officer for purposes of section 84 of the SCPA.⁶⁷ Also the section is antiquated⁶⁸ and cannot stand under the 1999

⁶² For a more exhaustive discussion see chapter 4 of Wodi, A (2009) *Garnishee Proceedings: A Critical Analysis of the Practice and Procedure in Nigeria*, Cap. 4, pp. 82 - 129 - Thesis submitted for award of LLM – Master of Laws degree by the University of Abuja.

⁶³ *National Union of Electricity Employees v. Bureau of Public Enterprises* (2010) 2-3 SC (Pt. II) 27 (Judgment delivered, February 25, 2010). The SC by this decision put an end to the controversy between its two conflicting decisions in *NEPA v. Edegbero* (2002) 18 NWLR (Pt. 798) 79 and *Onuorah v K.R.P.C. Ltd* (2005) 6 NWLR (Pt. 921) 393. The decision was followed a few months later in *Adatayo & 2 Ors v. Ademola, Federal Ministry of Works and Housing & Attorney General of the Federation* (2010) 3-5 S.C. (Pt. I) 87. (Judgment delivered on April 30, 2010).

⁶⁴ Or. 8 r. 2 (a) and (b), JER.

⁶⁵ Section 84(3) of the SCPA provides that “the appropriate officer” referred to is the Attorney General of the Federation or the Attorney General of a State depending on whether the public officer is in the public service of the Federation or of a State respectively.

⁶⁶ See the cases of *CBN v. Intestellar*; *CBN v. Njamenze* cited *supra* in contrast with *C.B.N. v. Hydro Air PTY Ltd* and *Ibrahim v. JSC* also *supra*.

⁶⁷ *Barclays Bank, D.C.O. v. Baderinwa: Re L.E.D.B.* (1962) 2 All NLR 731. MDAs and Statutory bodies, being artificial persons do not hold office in the Federal or State Civil Service.

Constitution and to that extent the consent of the Attorney General is not required for the enforcement of the judgment of a court.⁶⁹ The Apex court recently had the opportunity to put an end to the controversy but failed to do so as it merely held that where the Attorney-General is a party to the suit it is unnecessary to apply for consent.⁷⁰ The decision of course was not unconnected with the fact that the Court of Appeal had earlier held that where the Attorney-General pursuant to a judgment of court, has admitted owing a certain sum of money and even made part payment thereof, then it will not be necessary to seek his consent before proceeding to attach Government's fund in execution of the judgment in question.⁷¹

4.3 Attachable funds - We looked at attachable funds and provided a list⁷², which although is not intended to be exhaustive also mentioned Government funds found in the Federation Account and the Consolidated Revenue Fund (CRF). We looked at the cases of *Alexander Gaadi & Ors. v. FRN & Ors.*⁷³ and *Abdul Gafaru Yusuf & Co. Ltd & 2 Ors. v. FRN & CBN*⁷⁴ which are garnishee proceedings involving the attachment of Government Funds. Monies found in the CRF cannot be attached or disbursed without appropriation.⁷⁵

4.4 Proper parties - We looked at the issue of proper parties and noted that in view of the Supreme Court decision in *Green v. Green*⁷⁶ and section 83 of the SCPA the judgment debtor is a proper and necessary party to garnishee proceedings.⁷⁷ We submitted that it was wrong to assert, as often done by Counsels

⁶⁸ The provision was inherited from our colonial masters, the British, who themselves have since 1947 abolished the provision by the promulgation of the Crown Proceedings Act, 1947 in accordance with the global modern trend.

⁶⁹ *El Shaddai International Ltd v. Federal Republic of Nigeria* (2002) FNL(2005) 6 NWLR (Pt. 921) 393R 395, *Coram Bello, J.*

⁷⁰ *Central Bank of Nigeria v. Interstella Communications Limited & Ors* (2017) LPELR-43940 (SC)

⁷¹ *CBN. v. Interstella Comms. Ltd.* (2015) 9 NWLR (Pt. 1463) 1 CA

⁷² Money in bank accounts; salary or earnings; annuity payable by trustees; rent; unascertainable debts; cheques; promissory notes; foreign currency; money in custody of court; and government funds.

⁷³ Unreported Suit No. FHC/MKD/41/01 & FHC/MKD/CS/6/02; CA/E/244M/07.

⁷⁴ Unreported Suit No. FHC/ABJ/ARB/1/08.

⁷⁵ See ss. 80 - 81 of the CFRN, 1999

⁷⁶ (1987) 3 NWLR (Pt.61) 480.

⁷⁷ Oputa JSC of blessed memory, in the case of *Green v. Green* (LPELR 1338) 1 at 20 held that "proper parties are those who though not interested in the plaintiff's claim, are made parties for some good reasons. Desirable parties are those who may have an interest or who may be affected by the result. Necessary parties are those who are not

in garnishee proceedings, that the judgment debtor is not a proper party to garnishee proceedings⁷⁸. It has no basis in law and is against the principle of fair hearing as enshrined in the 1999 Constitution.

4.5 Service - We noted that Service is a fundamental tool to the commencement and hearing of a suit.⁷⁹ Failure or default of service of the order *nisi* is not a mere irregularity but a fundamental defect which renders the proceedings a nullity.⁸⁰ A party in garnishee proceedings, particularly the judgment creditor, must ensure that both the garnishee and the judgment debtor are served with the order *nisi* as provided in section 83 (2) of the SCPA and Or. 8 r. 4 of the JER otherwise risk rendering the proceedings a nullity, as an order absolute obtained in default of service can be set aside on such grounds.⁸¹

4.6 Appeals and interlocutory applications - We noted that in determining whether a decision of the court is final or interlocutory the Supreme Court proposed a test in the case of *Union Bank of Nigeria Plc. v. Boney Marcus Ind. Ltd*⁸². The court must ask the question, ‘does the decision finally determine the rights and liabilities of the parties?’ If it does then it is unquestionably final, if it does not then it is interlocutory. We looked at the effect of filing a notice of appeal as well as an application for stay of execution or an application for stay of proceedings pending the determination of an appeal. We also looked at grounds for setting aside an order absolute.⁸³

5.0 RECOMMENDATIONS

5.1 Jurisdiction should be better stipulated - The SCPA and JER should be

only interested in the subject matter of the proceedings but also who in their absence, the proceedings would not be fairly dealt with".

⁷⁸ Bamgboye, A. *Nigeria: Parties in Garnishee Proceedings- Matters Arising*, Daily Trust, 15th October 2019, <https://allafrica.com/stories/201910150077.html>

⁷⁹ *Sken Consult v. Ukey* (1981) 1 S.C. 6.

⁸⁰ *Drexel Energy & 2 Ors v. Trans International Bank Ltd & 2 Ors* (2008) 12 SC (Pt. II) 240.

⁸¹ *Ibid.*

⁸² (2005) 13 NWLR (Pt. 943) 654.

⁸³ Orders obtained by mistake or fraud can be set aside.

amended to stipulate which court garnishee proceedings may be brought, particularly when the court is not the court that delivered the judgment sought to be enforced. The amendment should state that garnishee proceedings may be brought before the court where the judgment was delivered or before any other court, namely: “the High Court, Federal High Court or Magistrate’s Court,” where the judgment debtor can sue the garnishee to recover the debt, due regard being had to the law and rules of determining jurisdiction in Nigeria. That way the courts would be required to consider the subject matter and the parties, as well as the rules of court and the provisions of the Constitution⁸⁴ before deciding whether or not to assume jurisdiction to hear an application for a garnishee order *nisi*.

5.2 Attorney General’s consent not necessary - The SCPA should be amended by deleting section 84 of the SCPA which requires the consent of the Attorney General before money in the custody and control of a public officer in his official capacity can be attached. Section 84 is unnecessary and unconstitutional. Its removal would be beneficial in two ways. Firstly this would put an end to the controversy over its applicability to artificial persons, namely government ministries, departments and agencies (MDAs). Secondly it would eliminate the likelihood of abuse by the Attorney General by unduly withholding his consent and ensure equality and fairness under the law between litigants, whether they are public or private individuals as intended by the 1999 Constitution. Finally it would ensure that the judgment of a court of competent jurisdiction is not defiantly disregarded or disparaged under the guise of ‘consent’ by another arm of government.⁸⁵

⁸⁴ Particularly sections 251, 257 and 272 of the 1999 Constitution relating to the jurisdiction of the Federal High Court, High Court of the Federal Capital Territory, Abuja and the State High Courts. As well as the various Civil Procedure Rules of the different Courts.

⁸⁵ Ekojoka F. Aghedo (2018), *Attorney General’s Consent In Garnishee Proceedings Versus Constitutionalism: Appraising The Status Of The Central Bank Of Nigeria*, Obafemi Awolowo University Law Journal, https://www.academia.edu/38443935/ATTORNEY_GENERAL_S_CONSENT_IN_GARNISHEE_PROCEEDING

5.3 Committal proceedings - Committal proceedings should not be commenced by the Judgment Creditor or entertained by the Courts when there is a pending appeal and an application for stay of execution.

5.4 Adherence to the law and procedure - Parties should be put to strict adherence to the law and procedure involved in garnishee proceedings. Courts should not hesitate to determine the matter against a party who fails to adhere to the law and procedure.

5.5 Fair hearing - Like in any other civil action, all parties to garnishee proceedings, namely: the judgment debtor; the judgment creditor; and garnishee must be served with the processes, particularly the order *nisi* and the order absolute and allowed to enter appearance and present their cases in accordance with the SCPA and JER.

5.6 Appeals - The appellate courts should not entertain appeals by the Judgment Debtor in respect of garnishee proceedings, especially when the order *nisi* is made absolute. Only the garnishee should be accorded the right of appeal in respect of an order absolute granted in garnishee proceedings. The judgment debtor's right of appeal should be restricted to the actual money judgment and not the garnishee proceedings which is a mode of enforcement of the said judgment. If the judgment debtor seeks redress he should attack the money judgment which was delivered against him by proceeding on appeal in respect of same.

5.7 Specialised courts and judges - It is recommended that Specialised Judges and Courts should be set up throughout the country to handle garnishee proceedings as this would facilitate efficient and expedient hearing of garnishee proceedings by judges who are knowledgeable in the practice and procedure of garnishee proceedings.

5.8 The ADR option - Parties should be encouraged to seek Alternative Dispute Resolution (ADR) Mechanism as an alternative to the regular courts instead of the time and funds wasted on litigating and re-litigating a matter through garnishee proceedings and appeals and cross-appeals. Parties would be free to determine the mode and time-table for payment of a judgment debt.

5.9 Proper parties - The Sheriffs and Civil Process Act (SCPA) and the Judgments (Enforcement) Rules (JER) should be amended to expressly state that the garnishor (i.e. judgment-creditor), the garnishee and the judgment-debtor are the proper parties to garnishee proceedings.

5.10 Attachable funds - The Sheriffs and Civil Process Act (SCPA) and the Judgments (Enforcement) Rules (JER) should be amended to include a list of attachable funds. The SCPA should clearly state that the list is not intended to be exhaustive or closed. The list may be amended from time to time subject to social convenience and the pronouncements of court. Such a list would save time and cost of prosecuting garnishee proceedings that are ultimately held to be incompetent and wrongful commenced.

6.0 CONCLUSION

In conclusion, we believe that the practice and procedure involved in garnishee proceedings is a little researched area of the law. Much of the materials on garnishee proceedings are to be found in case law, as opposed to law text books and journals. It is hoped that this humble effort would encourage researchers to produce scholarly works on garnishee proceedings. Garnishee proceedings are becoming increasingly popular as a mode of enforcement of money judgments particularly, against Government and its agencies. It is, therefore, submitted that an understanding of the law, practice and procedure involved in garnishee

proceedings has become necessary not only for law students or lawyers in practice, but also in-house counsel in Government establishments who may be in a position, as legal adviser, to advise the Management of their various organisations when faced with garnishee proceedings.

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May 2010. (re-worked March 2020).

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