

AN APPRAISAL OF SECTION 84 OF THE SHERIFFS AND CIVIL PROCESS ACT (CAP.S6), LAWS OF THE FEDERATION OF NIGERIA (LFN) 2004 ON PUBLIC FINANCIAL INSTITUTIONS

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Abstract

The main aim of a successful litigant after an arduous task of litigating in the court is to reap the fruit of his/her judgment. But most at times, the reverse may be the case especially regarding enforcement of judgment sums against Public Institutions which happens to be the judgment debtor. One of the methods of enforcing judgment against the judgment debtor is through garnishee proceedings. In other words, the fact that a party has gotten judgment in his favour does not simply mean that such a party has won the battle; he is yet to win the war. Enforcement is the last stage of judicial process after the legal right, claim, or interest has been converted into a judgment or order which remains to be enforced. Therefore, a party who has successfully obtained a final order or signed judgment against another has only won the first round in the fight.¹ This paper seeks to distinguish in the main whether the requirements of obtaining consent of the 'Appropriate Officer' where the debt which is sought to be attached is in the custody or under the control of a public officer in his official capacity or in *custodial legis* is needed in a public financial institution before obtaining the order Nisi. Enforcing this provision against an ordinary private bank where government interest is not involved poses no problem to the judgment creditor. The problem has always been that of interpretation of the word

¹ A. Babalola, *Enforcement of Judgments*, 1st Ed.(Intec Printers Ltd., Ibadan, 2003) culled from a paper titled " Efficacy of Garnishee Proceedings against Closed Banks/ Nigeria Deposit Insurance Corporation (NDIC) delivered at the Annual Sensitization Seminar for External Solicitors to Nigeria Deposit Insurance Corporation(NDIC) organized by NDIC at Colonnades Hotel, No.54 Alfred Rewane Way, Ikoyi, Lagos on 5th August,2015.

“appropriate officer” in this case, the Attorney General’s consent as required by statute, against a public financial institution like the Central Bank of Nigeria who is a banker to the government. Thus, the interpretation of Section 84(3) of the Sheriffs and Civil Process Act by the various Courts of Appeal in Nigeria with coordinate jurisdiction is conflicting and uncertain, thereby occasioning miscarriage of justice to the litigants. This paper seeks to streamline this position by proffering recommendations that will aid good business relationship between the citizens and the government.

Introduction

Garnishee proceeding is a judicial process of execution or enforcement of monetary judgment whereby money belonging to a judgment debtor in the hands or possession of a third party known as the ‘Garnishee’ (usually the bank) is attached or seized by a judgment creditor, the “Garnishor” in satisfaction of a judgment sum or debt. By its nature, a garnishee proceeding is “*sui generis*”, and different from other court proceedings, although it flows from the judgment that pronounced the debt. The extant laws regulating garnishee proceedings are the rules of court, case laws, the Sheriffs and Civil Process Act, S6 LFN, 2004 and judgment (Enforcement Rules) made pursuant to section 94 of the Act. Put succinctly, the general rule is that all debts due or accruing from any person to the judgment debtor, whether they are legal or equitable may be attached. However, to be capable of attachment, there must be in existence at the date the attachment becomes operative, something which the law recognizes as a debt, and not merely something which may or not become a debt.

Procedure in Garnishee Proceedings

Garnishee proceedings is done in two different stages; at the first stage, the judgment creditor makes an application *ex parte* to the court (which need not be the court that gave the judgment) that the judgment debt in the hands of the third party, the garnishee, be paid directly to the judgment creditor².

² Section 84(1) (2)

Section 84(1) provides; the court may, upon the *ex parte* application of any person who is entitled to the benefit of a judgment for the recovery or payment of money either before or after any oral examination of the debtor liable under such judgment and upon affidavit by the applicant or his legal practitioner that the judgment has been recovered and that it is still unsatisfied and to what amount and that any other person is indebted to such debtor is within the state, order that debts owing from such third person, hereinafter called the garnishee to such debtor shall be attached to satisfy the judgment or order, together with the cost of the garnishee proceedings and by the same or any subsequent order it may be ordered that the garnishee shall appear in court to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor or so much thereof as may be sufficient to satisfy the judgment or order together with cost aforesaid.

(2) At least fourteen days before the day of hearing, a copy of the order Nisi shall be served upon the garnishee and the judgment debtor.

The garnishee proceeding is usually handled in a most confidential manner because if the judgment debtor whose money is to be attached has advance notice of the impending attachment, he will withdraw his money from the bank and the purpose of the garnishee will be defeated.³

When an application for issuance of order is filed, the court, if satisfied will as a preliminary step issue a garnishee order nisi, under which the bank or the person on whom the order is issued is directed not to part with the money attached without the directive from the court. The

³ L. Afolabi, "*Law and Practice of Banking*", (Heinemann Educational. Books, Nigeria 2004) p.83.

service of the order nisi on the garnishee binds the debt in his custody.⁴ In effect, any payment of the debt to the judgment debtor or its alienation without the leave of the court shall be null and void. The garnishee may within 8 days of the service of the order nisi on it, pay into court the amount alleged to be due from him to the judgment debtor and the costs, a sum that satisfy that debt and cost. Once the payment is made, the proceedings against the garnishee shall be stayed.⁵ However, where a garnishee disputes his liability to pay the debt, he does not have to make any payment into court, but to appear in court on the return date and dispute his liability and the court may order that any issue or question necessary in determining his liability be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined or may refer the matter to a referee.⁶ Also a garnishee may contend that the debt sought to be attached belongs to some third person or that a third person has a lien or charge on it. Only money owed to the customer at the time of service of the order is attached. Money paid into the judgment debtor's account after the service of the order is not attached.⁷ Where the third person appears and after hearing his allegation and those of any other person who the court may order to appear, the court may order execution to issue to levy the amount due from the garnishee or any issue or question be tried and determined, and may bar the claim of such third person or may make such other order, upon such terms with respect to any lien or charge or otherwise as the court shall think just. Where the garnishee does not within the time prescribed, pay into the court the judgment sum being claimed and does not dispute the debt or where he does not appear as ordered, the court on proof of service, may order that the order nisi be made absolute.

It is pertinent to note that a garnishee proceeding is different from other enforcement proceedings like *writ* of execution.⁸ As rightly stated in *N.A.O.C Ltd.v Ogini*⁹ thus “a garnishee proceeding is a proceeding that is *sui generis*, in a class of its own and it is to be distinguished from other proceedings for enforcement of judgment, such as that by *writ* of execution” thus

⁴ *Wema Bank Plc v Brasterm – Sterr(Nig) Ltd* (2011) 6 NWLR Pt.1242 at p8. The court said, “ In a garnishee proceedings, the service of the order nisi on the judgment debtor is a condition precedent to the jurisdiction of the court to make an order absolute”.

⁵ Order viii, rule 5(2) of the Judgment (Enforcement) Rules.

⁶ Section 87 of the Sheriff and Civil Process Act

⁷ See *Happenstall v Jackson, Barclays Bank Ltd.* (1939)

⁸ By virtue of Section 19 of the Sheriffs and Civil Process Act , a writ of execution includes writ of attachment and sale, writ of delivery, writ of possession and writ of sequestration, but excludes garnishee proceedings.

⁹ (2011) 2 NWLR (Pt.1230) 131 at 147, paras., B,C

execution of judgment entails the seizure and sale of chattels of the judgment debtor under the warrant of a court. This is different from attachment of debt owed to a judgment debtor by a third party who is indebted to the judgment debtor which is not a proceeding against the judgment debtor directly.¹⁰

Public Financial Institutions.

Enforcement of judgment through garnishee proceedings against public financial institutions has a lot of hurdles to cross. The requirement is that of obtaining consent of the “appropriate officer” where the debt which is sought to be attached is in the custody or under the control of a public officer in his official capacity or in custodial *legis*.¹¹ According to the Act:¹²

Where money liable to be attached by garnishee is in the custody or under the control of a public officer in his official capacity, or in *custodial legis*, the order nisi shall not be made under the provisions of the last preceding section unless the consent to such attachment is first obtained from the appropriate officer. Under section 84(3) the appropriate officer means the Attorney General of the State or Federation as the case may be.

This provision in the Act is antithetical as it seeks to protect the government against execution of judgments at least by garnishee proceedings, to the detriment of the judgment creditor. It will also be curious that the Attorney General who defended the government during the trial will be so magnanimous to give consent to execute the judgment he had lost. It is also certain that the Attorney General might frustrate the Applicant as approval may not be furnished within time until the whole sum might have been disposed of in one form or the other to the detriment of the judgment creditor. It should be noted that the provision is mandatory and not merely

¹⁰ See *Purification Techniques (Nig.) Ltd. v A.G Lagos State*, (2004) 9NWLR (Pt.879) 655 at 678.

¹¹ A.T. Shehu, *Property Rights, Implication for Garnishee Proceedings in Nigeria*, University of Ilorin, Nigeria.

¹² Section 84(1) of the Sheriffs and Civil Process Act, Cap S6 LFN,2004

procedural which can be waived.¹³ In practice generally, garnishee proceedings as a means of execution or enforcement of judgment, has suffered a lot of setbacks due to divergent views of the Nigerian courts on the process. The one we shall concern ourselves on this paper is, whether the consent of the Attorney General of the State or Federation should be sought and obtained when a public institution (Bank) is the garnishee?

This problem has been a re-occurring decimal when the proceeding is initiated against a public institution like the Central Bank of Nigeria. This concerns mostly the status of the money in that bank. Some argue that, most of deposits maintained by banks with the Central Bank is depositors funds which would not be proper for attachment because they do not strictly speaking, fall within the category of monies that can be regarded as “due and accruing” from the Central Bank.¹⁴ Aside from this, the crux of the matter is, whether money held by the Central Bank of Nigeria in *custodial legis* as an artificial person requires the consent of the Attorney General? Some courts are in support of the view that Attorney General’s consent is vital before an order nisi should be applied for. In *Ibrahim v JSC*¹⁵ the Supreme Court was called upon to construe S.2 (a) of the Public Officers (Protection) Law, Cap, 111, Laws of Northern Nigeria. The Court called in aid the provisions of S.3 of the Interpretation Law, Cap. 52 Laws of Northern Nigeria, 1963 which defined a person to include artificial persons. More importantly, it defined a Public Officer in these terms;

“Public officer” or “Public department” to extend to and includes every officer or department invested with or performing duties of a public nature whether under the immediate control of the President or Governor of Northern Nigeria or not.

¹³ See *Adeleke v Oyo State House of Assembly* (2006) 4 FWLR6694 at 6788 where the Court of Appeal held that where there is a condition precedent before an action could be taken, full compliance with the precedent must be demonstrated. Failure to comply with or departure from the procedure is fatal.

¹⁴ A.T. Shehu, *Property Rights, Implication for Garnishee Proceedings in Nigeria*, University of Ilorin, Nigeria.

¹⁵ (1998) 14 NWLR (Pt. 584) 1

Applying the provisions of this legislation, Igu JSC stated thus, “it is clear to me that the term” Public Officer” has been extended to include a “Public Department” and therefore an artificial person, a public officer or a public body.

In *Corporal Effiom Bassey v Minister of Defence & 2 Ors*,¹⁶ the court held that, the Attorney General of the Federation is a public officer and is covered by the provisions of Section 84 of the Act. The word “custody” in the Act is used interchangeably with the words “under the control”. This shows that the real custodian of the money is not the bank but the public officer in control of the money as stipulated in section 84(3) and as such, the consent of the Attorney General of the Federation, in this instance, must first be sought and obtained before execution could be carried out against the public officer. The law here distinguishes between legal custody and physical custody. The latter being what the bank does.

Also in the case of *Onjewu v Kogi State Ministry of Commerce and Industry & Anor*.¹⁷ The Appellant (Onjewu) sued Kogi State Ministry of Commerce and Industry and got judgment. He commenced garnishee proceedings to enforce the judgment upon which an order nisi was granted directing First Bank Plc to appear to show cause why it should not be ordered to pay the judgment sum. The garnishee failed to appear as directed, and an order absolute was made. On appeal, the court considered the provisions of Section 8(3) of the State Proceedings Edict 1988 of Kogi State and Section 8(4) of the State Sheriffs and Civil Process Law which are in pari materia with the provisions of Section 84 of the Sheriffs and Civil Process Act.2004. In dismissing the appeal, the court held;

That since the demand for the consent of the Attorney General of the State is a sort of procedural and administrative in nature and it has not made any violence to the Constitution, it can be tolerated and accepted. I hold that the requirement of Attorney General’s consent is necessary before judgment of a High Court can be properly enforced.

¹⁶ (2006) AllFWLR(Pt.343)p.1799

¹⁷ (2004) 10 NWLR(Pt.827) p.40

The Court of Appeal also in *Central Bank of Nigeria v Hydro Air Pty Ltd.*¹⁸ aligns with the decision of the Supreme Court in *Ibrahim v JSC Kaduna State*¹⁹. The lone issue for determination was “whether by the combined reading of sections 84(1) (2) &(3) of the Sheriffs and Civil Process Act (Cap S6) Laws of the Federation of Nigeria 2004, the Learned trial Judge was right in holding that the Cross Respondent Bank was a public officer and consequently that the consent of the Attorney General of the Federation was required to be obtained before garnishee order nisi was made on 18/5/2011 to attach the funds in the account of the 1st Judgment debtor domiciled in the cross respondent bank. Based on the fact that the trial court in its said ruling had found that the respondent did not comply with section 84(3) of the Sheriffs and Civil Process Act, the appeal succeeds and the order nisi set aside.

Some Courts of Appeal through judicial activism have rejected the applicability of section 84(3) of the Sheriffs and Civil Process Act 2004 to public financial institutions.

According to the Act; “where money liable to be attached by garnishee proceedings in the custody or under the control of a public officer in his official capacity or in *custodial legis*, the order nisi shall not be made unless the consent to such attachment is first obtained from the appropriate officer in the case of money in the custody or control of a public officer or the court in the case of money in *custodial Legis*, as the case may be.”²⁰

This provision was amply interpreted by the court in *Purification Tech. (Nig.) Ltd. v A.G, Lagos State*²¹ thus;

Monies in the hands of a garnishee banker are not in the custody or control of the judgment debtor customer. Such monies remain the property in the custody and control of the banker; and payable to the judgment debtor until a demand is made. In the instant case, the monies held by the respondent in the garnishee banks were not under the custody or control of the respondent or public officer. Consequently, such monies are not

¹⁸ CA/L/235/2012delivered Thursday, the 27th day of March 2014.

¹⁹ *Supra.*

²⁰ Section 84(1) of the Sheriffs and Civil Process Act. Cap.S6, LFN 2004

²¹ (2004) 9 NWLR 671

subject to the provision of section 84 of the Sheriffs and Civil Process Act as contended by the respondent.

In order to make an inroad into this topic, we shall x-ray quite succinctly to ascertain who is a public officer within the meaning of the Act. Quite regrettably, the Act does not offer any definition of the expression "Public Officer". The old view appears to be that a distinction should be drawn between different categories of employees in determining who a Public Officer is within the Act. Thus in the case of *Momoh v Okewale*,²² the Supreme Court held that a driver was not a Public Officer within the meaning of the Act. Similarly, in *Ekemode v Alausa*,²³ the learned Magistrate held *inter alia* that a labourer was not entitled to the protection offered by the Public Officers Protection Ordinance. However, the Interpretation Act²⁴ defines a public officer as "a member of the public service of the Federation within the meaning of the Constitution of the Federal Republic of Nigeria or the State public service". The Constitution which is presently the relevant law, does not define a Public Officer, but defines a Public Service as "the service of the Federation in any capacity in respect of the government of the Federation and includes service as;

- (a). clerk or other staff of the National Assembly or of each House of the National Assembly
- (b). member of staff of the Supreme Court, the Court of Appeal, the Federal High Court, High Court, the High Court of the Federal Capital Territory, Abuja or other Courts established for the Federation by the Constitution and by an Act of the National Assembly.
- (c). member or staff of any Commission or authority established for the Federation by the constitution or by an Act of the National Assembly,
- (d). staff of any Area Council etc.

Therefore every government employee is a public officer within the meaning of the law.

²² (1977) 6 SC 81

²³ (1961) AllNLR 531

²⁴ Section 18, Cap 192 LFN1990

The question as to whether the Act applies both to natural persons as well as public authorities. The Supreme Court observes in *Amao v CSC*²⁵ that the law was aimed at protecting public officers as individuals. He went on to hold that;

It is now tolerably clear that the uncertainty in the operation of S.2 of the law has been laid to rest by the decision in *Momoh v. Okewale*, where in construing section 2, the Supreme Court observed as follows; it seems to have been overlooked that there is a vast difference between the titles of the two Acts. The Nigerian Act is entitled “Public Officers Protection Act”, whilst the English Statute bears the title “Public Authorities Protection Act”. The aims, objects and the purposes of the two Acts are different. The intention of the British Parliament in enacting the English Act was to protect Public Authorities engaged in the discharge of responsibilities imposed upon them by Parliament. The Nigerian law was aimed at protecting public officers as individuals in the discharge of their public duties.²⁶

In *Central Bank of Nigeria v Bob Kay Njemanze & Ors*²⁷, the Court of Appeal had this to say; this definition clearly excludes artificial persons. I have no difficulty in agreeing with the trial court that the term “Public Officer” as used in S.84 of the Sheriffs and Civil Process Act does not include an artificial person. Who then is a Public Officer contemplated by this provision? In *Shakira & Sons Ltd v The Governor of Kaduna State*²⁸ the term public officer was defined to only relate to the holder of the office as reflected only in section 318(1) of the Constitution of the Federal Republic of Nigeria (as amended). The said section 84 also referred to a public officer as a holder, officer or person holding a public office, the public officer referred to here that has the custody or in *custodial legis* of the money of the 3rd and 4th Respondents (the

²⁵ (1992) 7 NWLR Pt. 252. Cited in J.A. Dada, “Analysis of Public Officers Protection Act”, UNIUYO Law Journal, vol.2,1993

²⁶ See also *Alapfid v Governor of Rivers State* (1991) 8NWLR Pt.211, 575, *Tafida v Abubakar* (1992) 3 NWLR Pt.230, *Pharmaceutical Society Ltd v The London and Provincial Supply Association Ltd* (1880) 5 App. Cas. 8577 at 868-9

²⁷ (2015) 4 NWLR Pt.1449 P

²⁸ (2013) LPELR 20379 (CA)

Federal Government of Nigeria) is the Central Bank of Nigeria. The question to ask then is; is the Central Bank of Nigeria an officer or an Institution and what is its function in respect of this money of the Federation that is in its *custodial legis*?

Section 1 of the Central Bank of Nigeria Act²⁹ describes the CBN³⁰ to be a body corporate with perpetual Succession and a common seal and may be sued in its corporate name. One of the objects of the CBN was defined as follows; “act as a banker and provide economic and financial advice to the Federal Government.”³¹

The bank may – (a) issue demand drafts and effects other kinds of remittances payable at its own offices or at the offices of agencies or correspondents”.³²

- (b) The Bank shall receive and disburse Federal Government moneys and keep accounts thereof³³
- (c) It shall also act as a banker to the Federal, State and Local Governments and to act as their agents respectively.³⁴

But section 52 of the CBN Act shields the Federal Government, the bank or any officer of the government from liability in respect of adverse claims laid against the government or bank in connection with the execution or intended execution of any power conferred upon that government, the bank or such officer by the Act. The question then to ask is whether the bank or the government is prohibited by law from paying its dully incurred debts to its creditors? I definitely do not have problem with classifying the officers of the CBN as public officers but I find it unacceptable to classify CBN 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.

What then is the purport of section 84 of the Sheriffs and Civil Process Act? It is meant to avoid embarrassment of not knowing that funds earmarked for some purposes have been

²⁹ 2007

³⁰ Central Bank of Nigeria

³¹ Section 2(e) of the CBN Act, 2007

³² Section 27(a) of the CBN Act, 2007

³³ Section 36(2) of the CBN Act, 2007

³⁴ Section 39 and 40 of the CBN Act, 2007

diverted in satisfaction of a judgment debt which the government may not know anything about.³⁵ This in our humble view is like a drowning man struggling to catch any available rope.

We are of the firm view, that where the court is faced with conflicting decisions regarding prosecution of garnishee proceedings against public financial institutions, we submit that, the trial court should follow the most recent authority of the Court of Appeal on the issue in deciding the case. The older authorities such as the decisions in *Corporal Effiom Bassey v Min. of Defence & 2 ors*,³⁶ *Onjewu v Kogi State Min. of Commerce and Industry*³⁷ and other cases runs contrary to the recent decision of the Court of Appeal in *CBN v Njemanze & Ors*³⁸. Where there are two or more conflicting judgments from the courts of coordinate jurisdiction, they are not bound to follow each others decisions. This to all intent and purposes does not allow for certainty in the law and runs contrary to the well established cardinal principle of law. It is trite that the Supreme Court should be approached for proper interpretation and resolution of this conflict. We submit that certainty is the watchword for an established judicial system to command the confidence of the litigants and the Supreme Court should be activated to pronounce on this issue so as to lay the matter to rest.

Conclusion

The method of enforcing judgment through garnishee proceedings is regulated by the Sheriffs and Civil Process Act. Therefore, for the garnishor to attach the money in the hands of the garnishee, the debt must be “due or accruing to the judgment debtor” from the third person. It is the *bonafide* property or entitlement of the judgment debtor at the time of or during the pendency of the proceeding; once the garnishee is served with the order nisi, he cannot do otherwise with the money in his possession or custody until the order is discharged. The effect of Section 84 of the Act on public institutions is fluid and uncertain. The Court of Appeals in Nigeria have not found a common ground on the matter, especially going by the provision of Section 84(3) as to “who is a public officer” for the purpose of consent of the Attorney General in execution of judgment against government. We submit most respectfully that, the

³⁵ See *Onjewu v KSMCJ* (2003) 10 NWLR (Pt. 827) 40 at 89

³⁶ *Supra.*

³⁷ *Supra.*

³⁸ *Supra.*

requirement of consent of the Attorney General in public financial institutions before an order nisi is made is not necessary. The recent case of *CBN v Njemanze & Ors* accords with common sense and proper interpretation of Section 84. Therefore Section 84 of the Act should be amended by distinguishing the word “public officer” as against “public institutions” when the consent of Attorney General is in issue. It should be remembered that the essence of any law is to provide for the common good for the generality of the people. The foreign investors and private individuals will be encouraged to do business with government without fear of recouping their money. As at now, the cogent, compelling and irresistible inference deducible from the foregoing is that garnishee proceedings is not an efficacious way of enforcing money judgment against government or public institutions such as the Central Bank of Nigeria because the law is uncertain and trial courts are at liberty to pick and choose which Court of Appeal judgment to follow. Furthermore, Section 287(2) of the 1999 Constitution of Nigeria is in conflict with Section 84 of the Sheriffs and Civil Process Act, and to that extent should be declared null and void.³⁹ The section provides;

The decisions of the Court of Appeal shall be enforced in any part of the Federation by all authorities, persons, and by courts with subordinate jurisdiction to that of the Court of Appeal

The Sheriffs and Civil Process Act cannot override the provisions of the Constitution. The judgment of the court is sacrosanct and must be obeyed. The hurdle placed by the Act is lopsided, detrimental and does not provide a level playing field for the parties in adjudication thereby offending the rule against natural justice.

³⁹ The trial court in the case of *Central Bank of Nig. v Hydro Air PTY. Ltd(supra)*