

Propriety of Commencing Another Garnishee Proceeding Where First Proceeding Fails to Satisfy Judgement Debt

In the Court of Appeal of Nigeria
In the Lagos Judicial Division
Holden at Lagos
On Friday, the 23rd Day of June, 2023

Before Their Lordships

J. S. Ikyegh
Ebiowei Tobi
I.B. Gafai
Justices, Court of Appeal
CA/LAG/CV/1385/2019

Between

GLOBACOM LIMITED

APPELLANT

And

1. MTN COMMUNICATIONS LIMITED
2. STERLING BANK PLC
3. FIRST BANK PLC
4. ZENITH BANK PLC
5. FIRST CITY MONUMENT BANK PLC
6. WEMA BANK PLC
7. POLARIS BANK PLC
8. DIAMOND BANK PLC
9. HERITAGE BANK PLC
10. GUARANTY TRUST BANK PLC
11. STANBIC IBTC NIGERIA PLC
12. STANDARD CHARTERED BANK PLC
13. KEYSTONE BANK

RESPONDENTS

“...there is no provision in the Sheriff and Civil Process Act or the two applicable Rules referred earlier herein which outlaws a second or another garnishee proceeding if the earlier failed to satisfy the judgement sum.”

(Lead Judgement delivered by Honourable I.B. Gafai, JCA)

Facts

The Federal High Court sitting at the Lagos Judicial Division made a Garnishee *Order Nisi* against the Appellant in respect of its funds in the 2nd to 11th Respondent banks, following an application by the 1st Respondent to enforce an arbitral award made in its favour against the Appellant. Subsequently, the Appellant filed an application seeking to set aside the Garnishee *Order Nisi* and the garnishee proceedings in which it was made. The court however dismissed the said application for lacking in merit. Dissatisfied, the Appellant appealed to the Court of Appeal.

The Appellant and the 1st Respondents filed and exchanged their respective briefs of argument. The 2nd to 11th Respondent on the other hand did not file any brief.

Issues for Determination

In resolving the appeal, the Court of Appeal adopted the issues submitted for determination by the Appellant thus:

1. Whether the Federal High Court had the jurisdiction to grant the *Order Nisi* in respect of a claim which was statute barred in the first place.
2. Whether the 1st Respondent's garnishee proceedings before the lower court constituted an abuse of court process in view of its similar garnishee proceedings before the Abuja Judicial Division of the Federal High Court.
3. Whether the court below was not wrong in law in refusing to set aside its *ex-parte Order Nisi* made on 19th July 2019.

Arguments

On the first issue, counsel argued on behalf of the Appellant that the arbitral award that was enforced was made on 16th April 2009 and the application to enforce it was filed on 22nd May 2019, outside the six years limitation period for the 1st Respondent to apply to enforce the same as prescribed under Section 8(1)(d) of the Limitation Law of Lagos State. He submitted that the Respondent's right to enforce the award had been

extinguished by lapse of time, and as such, the order of enforcement made on 19th July 2019 was made without jurisdiction. Counsel for the 1st Respondent argued conversely that the six year period of limitation is not applicable to the instant case. He submitted that after the arbitral award was made against the Appellant on 16th April 2009, the 1st Respondent's initial attempt to enforce the same was struck out on 3rd June 2016; following which the 1st Respondent re-commenced enforcement proceedings at the Federal High Court on 22nd May 2019. Relying on **SIFAX (NIG) LTD v MIGFO (NIG) LTD & ANOR. (2018) LPELR-49735 (SC)**, he submitted that the time for the 1st Respondent to initiate enforcement proceedings only started running on 3rd June 2016 after the 1st Respondent's initial attempt to enforce same was struck out and not on 16th April 2009. He posited that the application of 1st Appellant was not statute barred.

On the second issue, counsel for the Appellant argued that the 1st Respondent pursued multiple garnishee proceedings simultaneously before the Abuja and Lagos Judicial Divisions of the Federal High Court, and the proceedings before the Lagos Judicial Division amounted to an abuse of court process. In response, counsel for the 1st Respondent argued that its second garnishee proceedings before the lower court seeking to enforce unpaid judgement debt is not an abuse of court process, firstly because it is not a simultaneous or contemporaneous one but a consecutive proceeding seeking to satisfy the judgement debt which the earlier garnishee proceedings at the Abuja Judicial Division could not satisfy. He cited the provisions of Section 83 of the Sheriff and Civil Process Act in support of his argument. He argued further that the subject matter of the two garnishee proceedings are different because while the claim in the earlier proceeding before the Abuja Judicial Division was for the principal sum/judgement sum, the latter proceeding before the Lagos Judicial Division was for the unattached balance of the judgement sum and post judgement interest.

Arguing the third issue, counsel for the Appellant posited that the lower court wrongly declined to set aside the *ex-parte Order Nisi* notwithstanding the Appellant's contention that the 1st Respondent concealed material facts relating to the pendency of the Abuja proceedings; a Notice of Appeal against the *Order Nisi* made by the Federal High Court, Abuja, the challenge to the jurisdiction of the Federal High Court, Abuja was now subject of an appeal and the pendency of a motion for Stay of Proceedings at the court in Abuja. He also argued that the 1st Respondent had wrongly approached the lower court by a motion *ex-parte* under Order 52 Rule 16 of the Federal High Court Rules without attaching thereto the Arbitration Agreement and without putting the Appellant on notice. He reasoned that this constituted a breach of the Appellant's right to fair

hearing. In response, counsel for the 1st Respondent argued that Order 52 Rule 16 of the Federal High Court Rules allow for an application for enforcement of an arbitral award to be brought *ex-parte* and that in any case, the Appellant was not entitled to notice upon expiration of the three months period within which it ought to have brought an application to set aside the award as prescribed under Section 29(1)(a) of the Arbitration and Conciliation Act. He placed reliance on the decision in **ALLIED ENERGY LTD & ANOR. v NIGERIAN AGIP EXPLORATION LTD (2018) LPELR - 45302**.

Court's Judgement and Rationale

In determining the first issue, the Court of Appeal held that *for the purpose of limitation law, the period of the pendency of a suit, relisted or recommenced, will not be counted against the Plaintiff in determining the date of the accrual of the cause of action, so long as the interval or interlude from the date the suit was struck out and the date it was relisted or recommenced did not exceed the length of the period limited under the relevant limitation law*. The court relied on the decisions of the Supreme Court in **ALHAJI HARUNA KASSIM v HERMANN EBERT (1966) LPELR - 25285** and **SIFAX (NIG) LTD & ORS v MIGFO (NIG) LTD & ANOR. (SUPRA)**. The Court of Appeal held that *in view of the 1st Respondent's initial suit and its subsequent suit before the lower court and the interlude between both which did not exceed the six years prescribed for commencing an action as prescribed under Section 8(1) of the Limitation Law of Lagos State, the 1st Respondents' suit for enforcement of the arbitral award that culminated into the Garnishee Order Nisi before the lower court was not statute barred*.

In resolving the second issue, the court referred to Order 30 of the Federal High Court (Civil Procedure) Rules, 2019 which prescribes the procedure for garnishee proceedings particularly Rules 7(1)–(2) thereto to the effect that proceedings for attachment of property in satisfaction of a judgement debt may be instituted in a court different from a court where another proceeding to attach property situate within a jurisdiction is pending. The court also referred to Section 83 of the Sheriffs and Civil Process Act which provides that garnishee proceedings may be taken in any court in which the judgement debtor could, under the High Court Rules or under the appropriate section or rule governing civil procedure in Magistrates' Courts as the case may be, sue the garnishee in respect of the debt. The court held that *construing these provisions together, it is clear that a Judgment Creditor could validly commence garnishee proceedings in a court other than that in which the suit is pending and there is no provision in the Sheriff and Civil Process Act or the two applicable Rules referred earlier herein which outlaws a second or another garnishee proceeding if the earlier failed to satisfy the judgement sum*.

The court held further that the argument of counsel for the Appellant that the latter garnishee proceedings before the Federal High Court, Lagos was commenced during the pendency of the earlier one in Abuja, is misconceived as the proceedings for the *Order Nisi* before the earlier court had in fact practically come to an end by the grant of the *Order Nisi* and what was adjourned *sine die* by the court was the second stage of the proceedings for an Order Absolute. Unfortunately for the 1st Respondent, the *Order Nisi* made by the Abuja Court turned out to be unsatisfactory because out of the total sum of ~~₦~~856,829,599.69k (Eight Hundred and Fifty Six Million, Eight Hundred and Twenty Nine Thousand, Five Hundred and Ninety Nine Naira, Sixty Nine Kobo) representing the debt recoverable under the Arbitral Award, only the sum of ~~₦~~39,923,557.05k (Thirty Nine Million, Nine Hundred and Twenty Three Thousand, Five Hundred and Fifty Seven Naira, Five Kobo) was disclosed by the garnishee banks in Abuja, leaving a whopping balance of ~~₦~~816,906,002.64k (Eight Hundred and Sixteen Million, Nine Hundred and Six Thousand, Two Naira and Sixty Four Kobo). The sum realised was grossly inadequate to satisfy the award sum. The appellate court also found that the reliefs sought in both garnishee proceedings are in reality different. Contrary to the argument of the Appellant, it was clear that the latter garnishee proceedings were for the unattached balance of the award sum and post judgement interest totaling ~~₦~~2,033,561,222.53k (Two Billion, Thirty Three Million, Five Hundred and Sixty One Thousand, Two Hundred and Twenty Two Naira, Fifty Three Kobo) and it cannot be said to constitute an abuse of court process.

On the third issue, the Court of Appeal reproduced the provisions of Order 59 Rule 16 of the Federal High Court Rules which permits a person seeking to enforce an arbitral award, to bring an *ex-parte* application. The court also reproduced the provision of Section 29(1)(a) of the Arbitration and Conciliation Act that prescribes that a person aggrieved by an arbitral award must bring an application to set it aside within a limitation of three months from the date of the award. Their Lordships upheld the submission of the 1st Respondent that the Appellant was not entitled to notice having failed to bring an application to set aside the award within the prescribed limitation period.

On the Appellant's arguments that the lower court failed to consider certain facts before it made the *ex-parte Order Nisi*, the court held that it is not the ruling of His Lordship, Oweibo J. granting the *Order Nisi* that is the subject of the instant appeal but that of His Lordship, Liman J. refusing to set aside the *Order Nisi*. Thus, the arguments on what

Oweibo J. failed to consider or wrongly considered, even if so, cannot form a subject of specific issue of argument albeit indirectly in the appeal.

Appeal Dismissed.

Representation

O. Owolabi for the Appellant.

A. Etuk with O. Etuk for the 1st Respondent.