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GARNISHEE PROCEEDINGS IN NIGERIA: THE NEED FOR REFORM

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Introduction

In the Nigerian judicial system, garnishee proceedings are a commonly used means of executing monetary judgments. The process is governed primarily by the Sheriffs and Civil Process Act[1] ("SCPA") and involves applying to the court for an order, commonly known as a garnishee order absolute, attaching the money of a judgment debtor in the hand of a third party (usually banks), for the purpose of satisfying the judgment sum. However, before making a garnishee order absolute, the court is required to make an initial order described as a garnishee order *nisi*, and the effect of a garnishee order *nisi* is that the third party against whom the order is made is prevented from paying the judgment debtor's funds in its custody until directives are given by the court on how the money should be applied. Based on the banking law principle that a banker-customer relationship makes the banker a debtor to its customer in respect of the funds held by the bank on behalf of the customer, a bank qualifies as a garnishee where it holds funds standing to the credit of the judgment debtor.

In most garnishee proceedings, virtually all the commercial banks in Nigeria are named as garnishees. This is because there is a general presumption that the judgment debtor will have accounts in one or more of such banks. This article will focus on banks as garnishees since that is the prevalent practice and will identify certain areas of the process where reform is required.

The Procedure for Garnishee Proceedings in Nigeria

The procedure for enforcing a judgment (money judgment) by garnishee proceedings in Nigeria is provided for by the SCPA. Specifically, by Section 83 of the SCPA, garnishee proceedings are initiated when a judgment creditor brings an *ex parte* application before the court for an order *nisi*[2] directing any other person who is indebted to the judgment debtor (referred to as the "garnishee"), to appear before the court to show cause why he should not be made to pay to the judgment creditor the debt due from him (the garnishee) to the judgment debtor, in satisfaction of the judgment sum. In other words, where A owes B money and C gets a judgment against B for a certain sum, C can seek an order from the court to have A pay to him, in satisfaction of B's judgment debt, the money A owes B or holds on behalf of B.

The affidavit filed in support of the *ex parte* application must state that judgment has been obtained, that the judgment sum is still unsatisfied, specify the unsatisfied amount, and that another person within the jurisdiction of the court is indebted to the judgment debtor. The language of section 83 of the SCPA clearly defines a garnishee as a debtor to the judgment debtor. In describing what must be contained in the application for the order *nisi*, the section states –

> "...and upon affidavit by the applicant or his legal practitioner...that any other person is indebted to such debtor and is within the State, order that such debts owing from such third person, hereinafter called

[1] Cap S6, Laws of the Federation of Nigeria, 2004.
[2] An order *nisi* is a court's order that will become absolute (final) unless the adversely affected party shows the court, within a specified time, why it should be set aside.

> the garnishee, to such debtor shall be attached to satisfy the judgment or order, together with the costs of the garnishee proceedings and by the same or any subsequent order it may be ordered that the garnishee shall appear before the 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 costs aforesaid."

By the wordings of section 83, it is clear that the law envisages a situation where the judgment creditor already has information that the named garnishee is indeed indebted to the judgment debtor before an application for the order *nisi* is made to the court.

Upon the grant of the order *nisi*, the law requires that the order *nisi* must be served on the garnishee and the judgment debtor at least 14 days before the next hearing.[3] Thus, the garnishee must have at least 14 days from the date of service of the order *nisi*, to the day of the hearing to show cause. The purpose of the hearing to show cause is to give the garnishee opportunity to show reasons, if any, why the garnishee order *nisi* should not be made absolute i.e. why the garnishee should not be made to pay the judgment debt to the judgment creditor. However, the service of the order *nisi* immediately binds the debt in the garnishee's hands until the court gives further directives. Any alienation of the debt after attachment without the leave of court is considered a violation of the order *nisi* and, in most circumstances, attracts punishment from the court.

It is worth noting that the SCPA does not set out the particular form or manner in which the garnishee is to show cause. However, as the courts are guided by records, this is usually done by filing an affidavit and the courts have approved this practice over the years.[4] In showing cause why it should not be made to pay the judgment creditor, the garnishee may dispute its indebtedness to the judgment debtor, in which case, the court may order that the issue be tried or determined. The garnishee may also show that the debt sought to be attached belongs to someone else or that someone else has a lien or charge upon it.[5]

Failure to file an affidavit to show cause by the return date for hearing may result in the order *nisi* being made absolute against the garnishee. At the same time, if the garnishee does not appear on the day of hearing, the court upon satisfying itself that the garnishee was served with the order *nisi* and that there is proof of service of the hearing date, may grant an order absolute against the garnishee either to the tune of the judgment debt or any part of it as may be sufficient to satisfy the judgment or order, together with the costs of the garnishee proceedings.

In all, a garnishee will be discharged from the garnishee proceedings if:

A. it does not dispute the debt; in which case the order *nisi* is made absolute and the garnishee proceeds to pay the judgment creditor, or

[3] Section 83(2) of the Sheriff and Civil Process Act.
[4] Nigerian Agip Oil Company Ltd v Peter Ogini & Ors (2010) 2 NWLR (Pt. 1230) 131; see also Nigerian Breweries Plc v Dumuje (2016) 8 NLWR (Pt. 1515) 536
[5] Sections 87 and 88, Sheriffs and Civil Process Act

B. it successfully shows cause why it should not be made to make any payment to the judgment creditor.

The prevailing practice

The prevailing practice in garnishee proceedings in Nigeria is for the judgment creditor to proceed against banks (as garnishees) without necessarily verifying the indebtedness of the bank to the judgment debtor. However, the SCPA stipulates that the garnishees ought to be persons that are **indebted to the judgment debtor**. The implicit requirement in that provision is that the judgment creditor ought to carry out thorough investigations to determine the actual debtors to the judgment debtor. It is therefore expected that an *ex parte* application for a garnishee order *nisi* directed against any bank as garnishee must at least clearly set out the proof of indebtedness from the garnishee to the judgment debtor or good reason for believing that the bank is indebted to the judgment debtor. For example, in the state of Michigan in the United States of America, a judgment creditor who wishes to 'garnish' a bank is required to include the judgment debtor's account numbers with the bank in the application form[6]. Therefore, in order for such a creditor to obtain the garnishee order, he must have already identified the relevant bank and acquired the judgment debtor's account number. In Nigeria however, it is common to see judgment creditors name as many banks as possible (sometimes all banks) in a fishing expedition, without bothering to investigate whether the judgment debtor maintains any account with these banks or providing any basis for naming the banks as garnishees.

Some have argued in favour of this approach because in the absence of a court order, banks will not disclose their customers' details to a judgment creditor because of the duty of confidentiality they owe their customers and such disclosure may amount to a breach of that duty. The resulting effect however is that banks find themselves continuously bearing unnecessary costs where they are named in garnishee proceedings but do not maintain any account for the judgment debtors.

The Case for Reform

The relevant question that needs to be asked is: why is compliance with the requirements of the SCPA as they relate to the need for judgment creditors to determine the true debtors of a judgment debtor, not being enforced? After all, the court is empowered to refuse the grant of an order *nisi* unless the judgment creditor provides *prima facie* evidence that the proposed garnishees are debtors to the judgment debtor. Yet, this power is rarely exercised. A number of suggestions have been made regarding how a judgment creditor may confirm the banks or other persons holding funds to the credit of a judgment debtor. Although these suggestions do not guarantee a clear result, they are worth considering and exploring.

[6] "Getting a Garnishment" *Michigan Legal Help,* Michigan State Bar Foundation, https://michiganlegalhelp.org/self-help-tools/money-and-debt/getting-garnishment

Corporate Search

Where the judgment debtor is a corporate entity, a search of the entity's corporate records at the Corporate Affairs Commission (CAC) may provide useful information on the company's bankers and debtors. For instance, companies are required to file their annual returns and financial statements at the CAC and the vast majority of corporate organisations disclose their banks in the notes to their Annual Financial Reports. Diligent judgment creditors may conduct corporate searches to determine the banks of their judgment debtors.

Engaging private investigators

Where the sum is substantial, a judgment creditor may engage a private investigator to obtain the requisite information regarding the judgment debtor's finances.

Reference to information on transaction documents

A judgment creditor may also obtain the details of a judgment debtor's bank accounts by noting the banks holding accounts from transactions done in the course of the dealings that led to the dispute.

Indication based on bank's failure to respond

Although banks will ordinarily not disclose details of their customers, it is suggested that banks may prefer to be given the opportunity to provide a confirmation that they do not hold an account on behalf of a judgment debtor prior to the commencement of the garnishee proceedings. If a judgment creditor writes to a bank it is considering making party to a garnishee proceeding, disclosing this intent, the details of the judgment and requesting for information as to whether the judgment debtor maintains any accounts with the bank, the bank may respond where the judgment debtor does not have any account with the bank. Where the judgment debtor maintains an account, the bank could, in a bid to uphold their customer's right to confidentiality, simply not respond to the letter. A judgment creditor could on that basis proceed to institute the garnishee proceedings against those banks that provided no confirmation as to whether the judgment debtor has an account with them. In other words, their silence could be taken to be an affirmation without any such disclosure occurring. Although the failure to respond will not always mean that the bank holds funds to the credit of the judgment debtor, the objective of giving banks the opportunity to avoid the cost and time associated with a court appearance, will be partly achieved. It will be in the interest of banks who do not hold the funds of the judgment debtor to respond appropriately.

However, apart from the possibility that banks will not respond, there is the risk that the banks would tip-off their customer and this may result in the judgment debtor moving the funds out of the account as there would be no pending court order restraining such a step.

Requesting the banks to file affidavits of verification.

In some State High Courts in Nigeria, particularly the High Court of Rivers State, the courts have begun to require that as a precondition to initiating garnishee proceedings, the judgment creditor should file an *ex parte* application for an order requiring the banks to file an affidavit of verification, essentially to confirm whether the judgment debtor maintains any account with the bank. The essence is to narrow the banks to be sued as garnishees to only those having banking relationships with the judgment debtor. While this does not necessarily result in a reduction of expenses as many banks still appear in court for these proceedings, this practice is noteworthy because failure to file the affidavit of verification would not have the hefty consequence of a garnishee order absolute but would simply result in the bank bearing the costs of the garnishee proceedings. As such, banks would have multiple chances to avoid a garnishee order absolute in respect of a judgment debtor with whom they have no banking relationship. This practice is a commendable effort in reducing the unnecessary costs borne by banks who are completely unaffiliated with judgment debtors and, in other states, may end up having to expend legal costs in trying to get the court to set aside a garnishee order absolute where there was some lapse in filing an affidavit to show cause.

Use of an Examination Notice

In looking at possible solutions, the options exercised in other jurisdictions also ought to be considered. For instance, in Australia, under the Uniform Civil Procedure Rules (NSW), a judgment creditor can gain the requisite information by means of an Examination Notice[7]. The Examination Notice would be issued to the judgment debtor and would require them to provide information as to their investments, tax returns, bank account and corresponding details, employer, liabilities and all such other information to assist in judgment creditor in pursuing execution. Failure to respond to this Notice within 28 days could result in an Examination Order which would compel the presence of the judgment debtor in court to answer these questions. If there is evidence that the judgment debtor is actively trying to avoid examination, a warrant for their arrest could be issued. In Nevada, USA, a similar procedure called a judgment debtor exam applies.[8] Once the appropriate motion is filed and granted by the court, the judgment debtor would be required to attend court, be placed under oath and answer any questions the judgment creditor deems necessary to ascertain their financial status in order to assist with execution. A judgment debtor who fails to attend court could be held in contempt with a bench warrant issued for their arrest.

Adopting the judgment debtor examination method would, however, require the amendment of the SCPA.

[7] "How Can the Examination of a Debtor Help Me Recover a Debt?", *Emma George*, Legal Vision, https://legalvision.com.au/can-examination-debtor-help-recover-debt/

[8] "Getting Information About a Judgment Debtor's Assets", *Civil Law Self-Help Center*, Legal Aid Center of Southern Nevada, https://www.civillawselfhelpcenter.org/self-help/judgments-for-money/how-to-collect-a-judgment/165-getting-information-about-a-judgment-debtors-assets

Conclusion

The solutions proposed above may be imperfect but there is no doubt that a solution of some sort is required. The reality of garnishee proceedings in Nigeria has far departed from the intention behind it. The above challenges notwithstanding, by the provisions of the SCPA, the duty to properly investigate and determine the garnishee's indebtedness to the judgment debtor, is still that of the judgment creditor. The SCPA does not envisage a situation where it is the garnishee that will do the work of the judgment creditor by scouring through its records to satisfy the judgment creditor's fishing exercise.

Even if the courts were to exercise leniency in favour of the judgment creditor because of the challenges with ascertaining persons indebted to the judgment debtor, it is important to consider and compensate the inconvenience and cost to persons named as garnishees but who do not have any financial relationship with the judgment debtor. The courts may for instance, make orders as to cost in favour of persons wrongly joined as garnishees or direct the Judgment Creditor to undertake to indemnify any garnishee that is later found not to have any relationship with the judgment debtor.

Overall, there is an urgent need for a redirection of this vital *sui generis* procedure so that its purpose can be achieved without innocent parties coming to harm. Where there are no consequences for joining a party that has no relationship with the judgment debtor as garnishee, it will continue to encourage the current fishing exercise by judgment creditors.

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