

## **THE EFFICACY OF GARNISHEE PROCEEDINGS IN THE ENFORCEMENT OF JUDGEMENT DEBT.<sup>1</sup>**

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Upon the delivery of a monetary court judgment<sup>2</sup>, parties to a suit becomes the Judgement Creditor and the Judgement Debtor accordingly. As such, different judgement enforcement options<sup>3</sup> becomes open to the judgement creditor to employ in reaping the benefit of the court judgement. One of such option which is the concern of this article is “GARNISHEE PROCEEDING<sup>4</sup>” as an option of enforcing court judgements. The main duty of this Article is to do an x-ray on “the efficacy of the Garnishee Procedure in the enforcement of judgement debts.”

To start with, a Garnishee Proceeding<sup>5</sup> according to the Blackslaw Dictionary (9<sup>th</sup> Edition) is a judicial proceeding in which a creditor (or potential creditor) asks the court to order a third party who is indebted to or is a bailee for the debtor to turn over to the creditor any of the debtor's property (such as wages or bank accounts) held by that third party. Parties to garnishee proceedings are: the Judgement Creditor (JC), judgment debtor and the Garnishee(s) as the case may be. The essence of a garnishee proceeding is to move the court to make a garnishee order directing the garnishee(s) to pay to the judgement creditor the sum of money standing to the credit of the judgement debtor in possession of the garnishee in satisfaction of the judgement debt.

According to Lord Denning, MR<sup>6</sup>, the origin of the word ‘garnishee’ comes from the Norman French. It means one who is required to ‘garnish’, that is, to furnish a creditor with the money

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<sup>2</sup> A judgement is the pronouncement of a court which completely and totally determines the rights, obligations, commitments, duties, interests, assets and liabilities of the parties, Per Ayoola JCA in *Ayimba V. Onovo* (2008) C. A. @ p. 23, paras. D-E. Note that S.294(1) of 1999 Constitution of Federal Republic of Nigeria stipulates that a court judgement shall be in writing. See *Okoruwa V. State* (1975) 5 S.C. @ p. 26, *Unaka V. C.O.P.* (1938) 3 F.S.C., *Jimoh Garuba v. ISIAKA Yahaya* (2007) LPELR-1311(S.C.).

<sup>3</sup> Writ of Fieri Facias, Judgement Summon, Garnishee Proceeding, Execution of Deed and Negotiable Instruments, Filing of Writ of Delivery of Goods, Writ of Sequestration, Payment by Instalment and Filing of a Certificate of Judgement.

<sup>4</sup> See *GTB v. Innoson Nigeria Ltd* (2017) LPELR-42368 (SC) for a detailed description of garnishee proceedings.

<sup>5</sup> Also know as Garnishment.

<sup>6</sup> In the case of *Choice Investments Ltd V. Jerominimon* (1981) QB 149 at 154,155. See also *Rainbow v, Mooregate Properties Ltd*, (1975) 2 All ER 821, *Pritchard v. Westminster* (1969) 1All ER 999.

to pay off a debt. In *Choice Investments Ltd V. Jerominimon*<sup>7</sup>, it was held that there are two steps in a garnishee process. The first is a garnishee ‘order nisi’<sup>8</sup> which is an order upon the judgement debtor to pay the judgement creditor or into court within a stated time, unless there is some sufficient reason why the garnishee should not do so. Such reason may exist if the garnishee disputes its indebtedness to the customer (debtor) for some reason or the other. where no sufficient reason is given, the garnishee order is made absolute upon the judgement debtor to pay the judgement creditor<sup>9</sup> or into court as ordered by the court<sup>10</sup>.

A garnishee could be an individual as well as a corporate organization. These days, financial institutions such as banks, employers and financial institutions are the garnishees in most garnishee proceedings. By implication, debts (any) owing to a judgement debtor from any other person within the jurisdiction of the court can be recovered towards the satisfaction of the judgement debt by the judgement creditor<sup>11</sup>. See *Sokoto State Government V. Kamdex (Nig.) Ltd (2004) 9 NWLR (pt. 878) 345 CA*. However, such sum in the custody of the garnishee(s) must be actually due and payable or else it is not attachable.

The Sheriffs and Civil Process Act Cap S6 L.F.N. 2004 and Judgment (Enforcement)Rules<sup>12</sup> enacted by state laws as the case may be governs the enforcement of judgements<sup>13</sup> in Nigeria. Under s.83 of the Act a judgment creditor can institute an action against a person<sup>14</sup> who is indebted /bailee of goods/money to the judgment debtor. By the rules of procedure, a Garnishee Application is to be made by Motion Ex-PARTE<sup>15</sup> supported with an affidavit, written address and the exhibits<sup>16</sup> being relied on.

A garnishee proceeding by its nature flows from the substantive case wherein judgment pronouncing the debt owing was delivered, yet, it is a distinct and separate action between the

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<sup>7</sup> Supra

<sup>8</sup> Which means ‘unless’

<sup>9</sup> Upon such payment, the garnishee is fully discharged from its indebtedness to the judgement debtor as if he himself directed the garnishee to make the payment.

<sup>10</sup> See also the Nigerian case of *Union Bank of Nigeria Plc V. Boney Marcus ind. Ltd (2005) 13 NWLR (Pt. 943) @ 666*, para E-G.

<sup>11</sup> This process is known as attachment of debt.

<sup>12</sup> made pursuant to the Sheriff Act and Civil Processes Act (Supra).

<sup>13</sup> The mode of enforcement of judgment may depend on the type of judgment that is to be enforced.

<sup>14</sup> Person as used in this context includes natural and juristic personality.

<sup>15</sup> without notice to the other party

<sup>16</sup> Certified True Copy of the substantive judgment against the judgement debtor.

parties involved. By this, the jurisdiction of the judgement court does not automatically suffice for the garnishee proceeding. A judgement Creditor seeking to attach the fund of the judgement debtor in the hands of another must thereby satisfy the following conditions:

- Provide the Name, address and occupation of the Judgement creditor, Judgement debtor and the Garnishee(s)
- Present an existing court judgment in its favour
- Show that the judgement sum remains unsatisfied/unpaid
- Clearly specify the amounts payable
- Show that the judgment debtor carries on business, is employed or resides within the court's jurisdiction.

Upon satisfying the above conditions, the court may grant a temporary order (known as order nisi) of attachment until a known period (the return date) directing the garnishee to show cause why it should not be made to pay such sum as directed by the court as judgement debt to the judgement creditor.

Upon being armed with a garnishee order nissi, the Judgement creditor must cross the next hurdle by ensuring personal service (unless otherwise directed by the court) of the garnishee order nissi on the garnishee(s) and the judgement debtor or else the court will be robbed of jurisdiction to embark on further proceedings on the return date<sup>17</sup>.

Upon successful service of the order nissi, the garnishee becomes bound to pay such amount of the judgement debtor's sum with it to the judgement creditor upon showing cause (accordingly) by filing an affidavit stating the extent of its liability or otherwise to the judgement debtor before the court. Where the garnishee wishes to dispute its debt/liability to the judgement debtor or has genuine reason why such judgement debtor's fund with it should not be attached, he must file an affidavit to show cause on or before the return date stating the reason (if any) it should not be bound by the order nissi granted by the court.

On the return date, where the garnishee cannot show to the contrary, the court as the circumstances permits under the law may make a permanent order (known as Garnishee order absolute) against the garnishee. By such absolute order, the garnishee becomes bound to pay the sum standing to the credit of the judgement debtor to the judgement creditor<sup>18</sup>. On the other

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<sup>17</sup> Case law

<sup>18</sup> An absolute order can only be set aside on appeal and not by the court who granted such order. See

hand, the judgement debtor may upon being served with the order nisi choose to pay the judgement debt on or before the return date or make arrangement to pay as may be necessary. Where this happens, the garnishee proceedings ends there and the garnishee(s) are bound to be discharged accordingly. It should be pointed out that a garnishee is liable to the judgement creditor only to the sum of the judgement debtor's fund with it as disclosed by the averment in the garnishee's affidavit to show cause<sup>19</sup>. Upon the filing of the affidavit to show cause by the garnishee(s) showing the extent of its indebtedness to the judgement creditor, the court is bound to declare the order nisi earlier granted absolute against the garnishee. Once an absolute order is granted, the court becomes *functus officio* on the matter and the judge cannot revisit it again even where new evidence surfaces<sup>20</sup>. On the contrary, where a garnishee fails to file an affidavit to show cause as is necessary, it shall be liable in line with section 86 of the Sheriffs and Civil Processes Act 2003 for the full judgement debt even where the judgement debtor's (does not have) money with the garnishee is not up to the judgement sum being garnisheed. Where the order is made absolute against the garnishee and he failed to pay, the judgement creditor may take out a writ of *fifa* against his property. If, however, the garnishee pays, then the debt of the judgment debtor is discharged.

By modern trends, garnishee proceedings may be brought against a defendant in certain situation where the law directs even before judgement is obtained against the defendant in the case. This is usually common in debt recovery cases before revenue courts in order to prevent the defendant from dissipating his monetary asset before the determination of the case in court. An example of this is the provision under the AMCON<sup>21</sup> Practice Direction which empowers the court to compel a garnishee(s) to disclose the amount standing to the credit of the defendant and to restrain access to such fund of the defendant with the garnishee.

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<sup>19</sup> Case Law

<sup>20</sup> See *Alor V. Ngene* (2007) 17 NWLR (pt 1062) @ 163. Also, *Union Bank of Nigeria Plc V. Boney Marcus Industries Ltd* (2005) 7 S.C. (Pt 11) 70.

<sup>21</sup> Asset Management Corporation of Nigeria established to acquire non-performing loans granted by the Banks and Financial Institutions in Nigeria and to recover such loans on behalf of the Federal Government of Nigeria.

Also note that rent due to a judgement debtor can be attached, but such is not attachable until it becomes payable by the tenant<sup>22</sup>. Pension<sup>23</sup> can be garnished<sup>24</sup>. Debt/Fund due to one of several judgement debtors can also be attached. But an indemnity from an insurance company even when payable by judgement of court is exempted from garnishee proceedings<sup>25</sup> (*Istraelson V. Daven (Port of Manchester Insurance Company)* (1993) 1 K.B. 301<sup>26</sup>).

### **Fundamental issues in garnishee proceedings.**

In as much as garnishee proceedings are sui generis in nature, yet it possess some fundamental issues viz:

- A garnishee order nisi can not be appealed against
- Injunction can not be granted to restrain a garnishee proceeding
- The judgement debtor is not a necessary party but a nominal party to the garnishee proceedings
- The Judgement Debtor has no right of appeal against the judgement creditor
- Garnishee cannot be held liable for satisfying the judgement debt and so on.

### **Pre-Action Notice and Garnishee Application.**

The necessity of a pre-action notice is not needed in bringing such proceedings against a statutory body. In *Pipeline & Products Marketing Company Ltd V. Delphi Petroleum Inc.*<sup>27</sup> The Court of Appeal per Salami JCA held that the provision for pre-action notice on a government establishment before commencement of garnishee<sup>28</sup> action is discriminatory as it places one party at advantage over the other as well as making one superior to the other. It further held that all parties are equal before the law. And that the requirement for pre-action notice in this instance negates the provision of section 6(6)(b) of the 1999 Constitution. As such, the contention of the judgement debtor on the issue of pre-action notification on government establishment as a condition for commencement of garnishee proceedings against

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<sup>22</sup> *Mitchel V. Lee* (1867) L.J. QB 259.

<sup>23</sup> Not gratuity

<sup>24</sup> Unless such attachment is expressly prohibited by statute.

<sup>25</sup> T. A. O. Tugbiyele (2015): *Debt Recovery Laws and Procedure with Forms and Precedents*. 3<sup>rd</sup> Ed. Pub. T.A.O. Tugbiyele & Co. pg 200.

<sup>26</sup> *National Insurance Commission v. Oyefesobi & ORS* (2013) LPELR-20660(CA)

<sup>27</sup> (2005) 8 NWLR (Pt. 928) 458 at 486 -487.

<sup>28</sup> Emphasis mine.

Nigeria National Petroleum Corporation was disallowed in its entirety. The jurisprudential analysis for this may be that the provision of the Sheriff and Civil Processes Act are not made subject to any particular law; the judgement debtor not being a party to the proceedings is not entitled to pre-action notice of such proceedings as such notices where permitted would defeat the essence of the proceeding, lead to dissipation of the 'res'<sup>29</sup> (money).

In spite of the above stated principle of law, it is constructive to note that a somewhat exception to the above provision is where the judgement debtor's fund sought to be attached is in the custody of a Public Servant or the Central bank of Nigeria. The Law<sup>30</sup> provides that consent of the Attorney General of the Federation must first be obtained before commencing such proceedings<sup>31</sup>. The implication of this is that where the consent of the Attorney General is not sought and obtained before obtaining a garnishee order nisi, the court is de-robed of the pre-requisite jurisdiction in granting such order nisi<sup>32</sup>. However, money in commercial banks belonging to government is not money in the government's custody and such can be garnished without the consent of the Attorney General<sup>33</sup>.

### **Limitations to Garnishee Applications.**

By implication, the power of the court to attach the judgement debt in the hands of another is subject to some limitations which may even be a defense available to the garnishee under the law. Some of these limitations includes:

- Garnishee's right of Lien or set-off<sup>34</sup>
- Money in the hand of Garnishee assigned to another cannot be garnished.
- Money in Account jointly owned cannot be garnished.
- Money in a Partnership Account cannot be garnished.

### **Defences available to the Garnishee includes:**

- That the Account sought to be garnished is in Debit.
- That the Judgement Debtor is not known to/does not maintain account with the Garnishee.
- That there is a pending appeal against the judgement.
- Non Service or Lack of Proper Service of the order nisi on the judgement debtor.

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<sup>29</sup> Subject matter of the proceeding.

<sup>30</sup> Section 84(1)(3) of the Sheriff and Civil Processes Act.

<sup>31</sup> See the case of CBN V. Shipping Company Sara B.V. (2015) 11 NWLR (Pt. 1469) 130, 155.

<sup>32</sup> Case law.

<sup>33</sup> Purification Technic (Nig.) Ltd. V. A.G. Lagos State (2004) All FWLR (Pt. 211) 1467, 1494.

<sup>34</sup> Fidelity Bank Plc V. Francis Okwuowulu (2012) LPELR.

- Garnishee does not reside/carry on business within the jurisdiction of the Court.
- Order nisi is not based on a valid and subsisting court judgement.
- Non attachment of the Certified True Copy of the Judgement to the garnishee application.
- Consent of the Attorney General not sought and obtained where necessary.

Over the years, garnishee proceedings have proven to be a prominent, rewarding and viable mode of enforcing money judgement. More so where the process is timeously exploited and executed successfully, it can be highly rewarding and satisfying as a judgement enforcement mode.

Garnishee Proceedings is unarguably the commonest form of judgement enforcement procedure for money judgements for a number of reasons ranging from the fact that it is cost effective and affords the judgement creditor access to the judgement debtor's fund and payment of such money directly to the garnishee<sup>35</sup> as the case may be. Also, it is less cumbersome when compared to some other judgement enforcement procedures. It has been widely employed as an effective means of judgement enforcement due to its straight forward nature where properly taken out.

Despite its effectiveness as a means of judgement enforcement, practice over time has revealed that garnishee proceedings sometimes do not achieve the intended objective due to certain factors. Some of these factors are human interference in the application of the law such that garnishees have been reportedly involved in manipulating enforcement of order nisi in favour of the judgement creditor to hide facts as to the indebtedness or otherwise of the judgement debtor. At times, it is difficult to ascertain the veracity of the garnishee's deposition in the affidavit to show cause as to the liquidity of the judgement debtor. In some cases, garnishees such as financial institutions and commercial banks do connive with the judgement debtor to concoct fact or deny same despite being under oath to the ignorance of the judgement debtor or the court.

It is the opinion of the writer that the law regulating garnishee proceedings be reviewed and amended in order to address modern development and trends in the society. Such as in the identification of a judgement debtor's account with the garnishee. It is hereby suggested that the rules of the Sheriff and Civil Processes Act and judgement enforcement rules be expanded to accommodate identification of a judgement debtor's account with the Banks through the unique Bank Verification Numbers (BVN) of the judgement debtor. This way, it becomes easier to identify the judgement debtor's account and also minimizes scenario of having to furnish further particulars in court as to the details/information of the judgement debtor.

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<sup>35</sup> Judgement Creditor.

It is further proposed that service of order nisi on the garnishee should be expanded to include service by electronic means of service with the leave of the court. The essence of this is to reduce antecedent cost of service, bottleneck and at many times delay in effecting service of the order nisi on the judgement debtor by the court sheriff within which period the judgement debtor may have gotten information of such order and proceeded to dissipate the money in such garnished account. This suggestion is borne out of the fact that judgement debtors at times (on being aware of the subsisting order nisi) connives with garnishee(s) to play a fast one by quickly moving the money out of the account before the garnishee is served with the order nisi of the court. Litigants have had course to narrate sorry tales of bank officials allegedly transferring money out of the garnishee's account shortly before being served with the order nisi<sup>36</sup>.

In conclusion, garnishee proceedings remains an effective, timely, cost effective and somewhat convenience means of recovering judgement debt albeit the need for reformation and amendment of the process and procedure in line with emerging realities as law must continue to move in line with the pace of societal evolvments so as to ensure that the judgement creditor after going through the costly and time consuming process of litigation is able to reap the fruit of such litigation with little or no ado.

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<sup>36</sup> A case abound in which the Garnishee (a very popular Bank) purportedly acting on instruction allegedly transferred fund out of the garnishee's account at exactly 3:59pm while the order nisi was served on the bank by 4:00pm.