

# THE RIGHT OF HEARING OF A JUDGMENT DEBTOR IN GARNISHEE ORDER NISI PROCEEDINGS<sup>1</sup>



## ABSTRACT

The prevailing view regarding the right of a judgment debtor in an *ex parte* application for a garnishee order nisi, is that the judgment debtor cannot be heard. While this may be the general view, this article attempts to consider the propriety of this position vis-à-vis the provisions of the law and judicial precedents, and whether there are any exceptions. Should a judgment debtor, who has filed a Notice of Appeal and a Motion seeking a stay of execution of the court's judgment be excluded from the hearing in a court proceeding simply because the judgment creditor has filed an *ex parte* application praying for a garnishee order nisi?

## INTRODUCTION

Garnishee<sup>2</sup> proceedings are used in the enforcement of monetary judgments in Nigeria. A Judgment Creditor<sup>3</sup> approaches the court by way of an *ex parte* application for an order nisi to attach monies belonging to the Judgment Debtor<sup>4</sup> in the custody of Garnishees. The application must be supported by an affidavit stating the right of the Judgment Creditor to the monies; and that the Judgment Debtor has monies in the custody of third parties (the Garnishees), which can be used in satisfaction of the judgment debt.

Once served with the garnishee order nisi, the Garnishees and the Judgment Debtor, are required to show cause why the order nisi should not be made absolute, and the monies used to satisfy the judgment debt. The process *sui generis*<sup>5</sup> is primarily governed by S. 83 of the Sheriffs and Civil Process Act<sup>6</sup> and the Judgment (Enforcement) Rules.

## GARNISHEE PROCEEDINGS IN NIGERIA

At least, three parties are involved in garnishee proceedings, - the Judgment Creditor; the Judgment Debtor and the person holding the funds - the Garnishee.

Garnishee proceedings are commenced by an *ex parte* application by the Judgment Creditor supported by an affidavit. Once heard, the court may order the Garnishee to appear and explain why the court should not compel him to pay the sum owed to the Judgment Creditor in satisfaction of the judgment debt.

In **Union Bank of Nigeria Plc v. Boney Marcus Industries Ltd & Ors**<sup>7</sup>, the Court of Appeal held:

*"I am fortified by the above observation to hold that the garnishee proceedings in the Court below were no more than an interlocutory application. Pure and simple. It was a form of execution of the judgment on the 17th May, 1997. Thus, as observed by Farwell, L.J., in White, Son & Pill v. Stennings (1911) 2 K.B. 418 at page 428:-*

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<sup>2</sup>A Garnishee is a person who is indebted to another person, and who is being directed to surrender the money to another person.

<sup>3</sup>A Judgment Creditor is a person in whose favour a judgment has been given.

<sup>4</sup>A Judgment Debtor is a person against whom a judgment has been given and who now has obligations to the Judgment Creditor by virtue of the judgment.

<sup>5</sup>The Wex Definitions Team of the Cornell Law School Legal Information Institute (LII) defines Sui generis as a Latin expression which translates to – of its own kind. It refers to anything that is peculiar to itself; f its own kind or class. Merriam-Webster Dictionary defines it as constituting a class alone; unique; peculiar.

<sup>6</sup>Cap S6, Laws of the Federation of Nigeria, 2004

<sup>7</sup>(2000) LPELR-10667 (CA)

**"The garnishee process in both the High Court and the County Court is, in my opinion, intended to have the effect of process by way of execution of a judgment.**

**.. and per Kennedy, L.J. at page 431:-"In my opinion, it is in its nature essentially a method of execution. It is one of the kinds of execution contemplated in Order XLII of the Supreme Court. It is one method of enforcing a judgment for payment of a sum of money."**

In **Guaranty Trust Bank Plc v. Innoson Nigeria Limited**,<sup>8</sup> the Supreme Court held:

*".. garnishee proceeding is... a process of enforcing a money judgment by the seizure or attachment of the debts due or accruing to the judgment debtor which form part of his property available in execution. The third party holds the debt or property of the Judgment Debtor. By this process, Court orders the third party to pay direct to the judgment creditor or to the Court the debt due or accruing from him to judgment debtor, as much of it as may be sufficient to satisfy the amount of the judgment debt and the cost of the garnishee proceedings."*

The court in making such an order must ensure that there is a valid judgment, that remains unsatisfied, and the Garnishee holds the credit of the Judgment Debtor.

## THE PROCEDURE

In the most recent case of **Oboh & Anor v. Nigeria Football League Ltd & Ors**,<sup>9</sup> the Supreme Court per Ejembi Eko, JSC described the nature and procedure of garnishee proceedings as follows:

*"The judgment creditor first makes the application to the Court for garnishee proceedings. The order of Court then comes in two stages. The first is garnishee order nisi which directs the garnishee to pay the sum covered by the application either to the Court or the judgment creditor within a stated time unless the party (the garnishee), against whom the order is made, shows good cause why the payment should not be made. If no sufficient good cause is shown the Court then makes the garnishee order absolute directing the third party (the garnishee) to pay over the amount specified to the judgment creditor or to the Court, whichever is more appropriate. See Choice Investments Ltd v. Jeromnimon (1981) QB 149 at 154 - 155; Union Bank Plc v. Boney Marcus Industries Ltd (supra). At the stage of garnishee order nisi the amount standing to the credit of the judgment debtor in the hands of the third party (the garnishee) is, or has been, attached, that is garnished".*

In the first instance, the application for a garnishee order nisi is an ex parte motion filed by the Judgment Creditor and is not required to serve the process on the Judgment Debtor or Garnishees as they are not ordinarily required to be heard. Once satisfied the court may make its order nisi and Section 83(2) SCPA requires this to be served upon the listed Garnishees and the Judgment Debtor at least fourteen (14) days before the day fixed for hearing the parties<sup>10</sup>

Once served with the order nisi, parties are required to file affidavits to show cause why the court should not make the order absolute. In the interim, the Garnishees have a duty to ensure that the sums in their custody, if any, are not dissipated<sup>11</sup> pending the determination of the second stage of the garnishee proceeding. The service of the order nisi creates an equitable interest in the Judgment Creditor's favour..

<sup>8</sup> (2017) LPELR-42368 (SC)

<sup>9</sup> (2022) LPELR-56867 (SC)

<sup>10</sup> See Order VIII Judgment Enforcement Rules

<sup>11</sup> Section 85 Sheriffs and Civil Process Act

The Judgment Debtor is required to show if he has any sums or monies standing to his credit in the custody of the Garnishee. The Garnishee is also required to indicate if there are any earlier charges or liens created in respect of the sums held. Where the Garnishee has no sums in his possession, the Garnishee is discharged from the proceedings.

Once the garnishee order is made absolute, the Garnishee is required to pay the garnished sum to the Judgment Creditor to satisfy the judgment debt.<sup>12</sup>

The Court of Appeal in **Ama Real Estate Ltd v. Heritage Bank Plc**<sup>13</sup> held:

*“Now, by Section 86 of the Sheriffs and Civil Process Act, it is provided as follows: “If the Garnishee does not within the prescribed time pay into Court, the amount due from him to the judgment debtor, or an amount equal to the judgment debt, together with the cost of the garnishee proceedings, and does not dispute the debt due or claimed to be due from such debtor, or if he does not appear upon summons, the Court upon proof of service may order execution to issue, and it may issue accordingly without any previous writ or process, to levy the amount due from such garnishee, or so much thereof as may be sufficient to satisfy the judgment or order, together with the cost of the Garnishee proceedings.” From the succinct provision above, it does appear to me that under Garnishee proceedings, the role or duty of the Court on the return date after the issuance of the Garnishee Order Nisi is clearly cut out for it by law. Where a Garnishee, who has been duly served with the Garnishee Order Nisi fails to file an affidavit to show cause why a Garnishee Oder Nisi should not be made absolute, the only option open to the Court, and if so asked for by the Judgment Creditor or his counsel, is to proceed and make the Garnishee Order Nisi Absolute.”*

## JUDGMENT DEBTOR CANNOT BE HEARD IN GARNISHEE PROCEEDINGS

The general view is that the Judgment Debtor cannot be heard in an ex parte application for a garnishee order nisi and there is a deluge of judicial authorities on this point. In **CBN v. Interstella Communications Ltd & Ors**,<sup>14</sup> the Supreme Court held:

*“The law is long settled that a Garnishee proceeding is strictly between the judgment creditor and the Garnishee who is indebted to the judgment debtor.”*

Also, in **Gwede v. Delta State House of Assembly & Anor**,<sup>15</sup> the Supreme Court while considering when a judgment debtor should be heard in garnishee proceedings held

*“It has to be noted that at the stage of the ex - parte application only two parties, i.e. the judgment creditor and the garnishee are involved in the proceedings. However, after the service of the order nisi on the judgment debtor, as the Court of Appeal would say in NAOC Ltd v Ogini (supra), the subsequent hearing envisage a tripartite proceedings in which the three parties are represented. . . at this stage of the proceedings, the three parties can be heard by the Court before an order absolute is made depending on the facts and circumstance of the case. I say so advisedly bearing in mind that garnishee proceedings is in the nature of enforcement of the judgment of a Court of law and does not permit the re-opening of hearing in a matter which has been settled in the judgment sought to be enforced.”*

### The Judgment Debtor’s Right to be Heard in Garnishee Order Nisi Proceedings

<sup>12</sup> Section 86 Sheriffs and Civil Process Act

<sup>13</sup> (2022) LPELR-57046 (CA)

<sup>14</sup> (2017) LPELR-43940 (SC)

<sup>15</sup> (2019) LPELR-47441 (SC)

Every case must be heard and decided upon the peculiar facts presented by the parties, and this in our view allows an exception to the general position.

Section 83 SCPA which is often relied upon 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 judgment has been recovered and that it is still unsatisfied and to what amount...”*

This provision suggests that the court has the discretion to hear the Judgment Debtor in an application for garnishee order nisi either before or after granting the garnishee order nisi. For instance, where there is an application for stay of execution or Motion challenging the jurisdiction of the Court, the law permits the Court to hear the Judgment Debtor in garnishee proceedings in view of the pending applications.

In **WAEC vs. Mrs. Nkoyo Edet Ikang**<sup>16</sup> the Court of Appeal, in a similar circumstance, held as follows:

*It is true, as argued by learned counsel for the 1st Respondent, that garnishee proceedings is distinct since it is between the judgment creditor and the garnishee and a judgment debtor who has appealed against the decision which led to the ex parte garnishee application by the judgment creditor can appeal as an interested party against the order nisi. However, I am still at a loss as to the reasonableness of a court ignoring to deal with a pending application for stay of execution of the judgment and proceed to grant the ex parte garnishee application. I FEEL STRONGLY THAT IT IS BETTER FOR THE COURT TO DISPOSE OF THE APPLICATION FOR STAY OF EXECUTION OF THE JUDGMENT BEFORE CONSIDERING THE EXPARTE GARNISHEE APPLICATION. After all the granting or refusal of a stay of execution is discretionary.*

Garnishee proceedings are an enforcement and executory mechanism. In **Nigerian Breweries Plc v. Dumuje**,<sup>17</sup> execution was defined to mean the process of enforcing or giving effect to the judgment of the court, and it is completed when the Judgment Creditor gets the money or other thing awarded to him by the judgment. In our opinion, there is no difference between the execution of a judgment and garnishee proceedings, as both are aimed at recovering the fruits of a judgment. Therefore, it is improper to allow garnishee proceedings to continue in the face of a pending application for a stay of execution. The court also held:

*I agree with the general view that where there is a pending application for stay of execution, especially in a superior court, it will be absurd for a party to execute the same judgment by way of a Garnishee proceeding on the premise that it is an independent proceeding which is not an execution of judgment and does not require the attention of the judgment debtor. If such judgment is executed, will it not impose on the Superior Court a fait accompli? Is this not indeed the situation abhorred and condemned by the Supreme Court in Vaswani v. Savalakh (Supra).*

<sup>16</sup> (2011) LPELR-5098(CA),

<sup>17</sup> (2016) 8 NWLR (Pt. 1515) 536 at 632 – 633 paras. F-B

*Where an application for stay of execution is pending and the judgment creditor by means of garnishee proceedings proceeds to enforce and recover the judgment sum, it definitely overreaches the pending application for stay of execution. THIS IS SO BECAUSE ENFORCEMENT OR EXECUTION OF THE JUDGMENT HAVING BEEN ACHIEVED BY THE GARNISHEE PROCEEDINGS, THERE WILL BE NOTHING LEFT FOR THE COURT TO CONSIDER IN THE PENDING APPLICATION FOR STAY OF EXECUTION SINCE A FAIT ACCOMPLI HAD THRUST UPON IT." Per OGAKWU, J.C.A. (Pp. 162-167, paras. E-C)<sup>18</sup>*

Accordingly, where there is a pending application for a stay of execution of judgment, a party cannot execute the judgment by a garnishee proceeding on the premise that it is an independent proceeding which is not an execution of judgment that does not require the attention of the Judgment Debtor. Doing so will impose a fait accompli on the superior court.

Considering that a garnishee proceeding is an enforcement proceeding, it thereby becomes pertinent for the court to hear from the Judgment Debtor where a garnishee application is filed during the pendency of an application for a stay of execution. In **Sani v. Kogi State House of Assembly**,<sup>19</sup> the Supreme Court held:

*"In other words, it is the court that determines whether a judgment debtor should be heard or not. If the judgment debtor's application before the court is to reopen issues settled in the judgment, the application cannot be heard. **But if the application is to draw the attention of the court to misleading facts presented by the judgment creditor, the application can be heard.**"*

Therefore, where a Judgment Debtor has filed a motion for a stay of execution and the Judgment Creditor files a motion for garnishee order nisi, the courts are enjoined to grant the Judgment Debtor a right of audience since the garnishee proceedings are enforcement and executory in nature which the motion for stay affects.

## CONCLUSION

It therefore follows that a Judgment Debtor should be heard in garnishee proceedings where he has lodged an appeal against the decision of the court and filed a motion for stay of execution. It would be improper and unfair for the court to proceed to make a decree order nisi in these circumstances.

<sup>18</sup> Nigerian Breweries Plc v. Dumuje (Supra) at 589 and 630

<sup>19</sup> (2021) 6 NWLR (Pt. 1773) 422

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