

**IN THE HIGH COURT OF JUSTICE OF THE FEDERAL CAPITAL TERRITORY**

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT HIGH COURT MAITAMA –ABUJA**

**BEFORE: HIS LORDSHIP HON. JUSTICE S.U. BATURE**

<b>COURT CLERKS:</b>	<b>JAMILA OMEKE &amp; ORS</b>
<b>COURT NUMBER:</b>	<b>HIGH COURT NO. 33</b>
<b>CASE NUMBER:</b>	<b>SUIT NO. FCT/HC/CV/2316/19</b>
<b>DATE:</b>	<b>17<sup>TH</sup> SEPTEMBER, 2020</b>

**BETWEEN:**

**AUTOMATION INTEGRATED CONCEPT.....APPLICANT**

**AND**

**OME ASSOCIATES.....RESPONDENT**

**APPEARANCE**

Austine Mwana Esq for the Applicant/Objector  
Parties absent.

**RULING**

Before the court is a notice of Preliminary objection dated 27<sup>th</sup> day of March, 2019 brought pursuant to Section 91 of the Sheriff’s and Civil Process Act, Order 8 Rule 10 of the Court of Appeal Rules and Section 6 of the 1999 Constitution, As Amended.

The grounds upon which the objection is predicated are contained on the Face of the motion paper. The reliefs sought are as follows:-

- i. An order setting aside and/or vacating the ex-parte Garnishee order of 14<sup>th</sup> November, 2018 and all such other orders that had arisen from the garnishee proceedings.
- ii. Cost of the instant Application/Action.

In support of the preliminary Objection is a five paragraphed affidavit deposed to by one Victoria Christopher (Miss), a litigation Secretary in the chambers of Agboebulem & Co. Solicitors to the Objector. Attached to the Supporting Affidavit are annexures marked as Exhibits A & B respectively. Also filed in support is a written address.

In the said written address, learned counsel to the Judgment-Debtor/Objector Austin Mwana Esq formulated two issues for determination, to Wit:-

1. Whether the Judgment Debtor/Applicant/Objector can be heard in a garnishee proceedings as in the instant case.
2. Whether the Applicant's appeal having been entered at the court of Appeal, Abuja as Appeal No. CA/A/762/2018, this Court is seized of jurisdiction to entertain any further proceedings or application before it other than to set aside and/or vacate its order made on 14/11/18?

In arguing the issues, counsel submitted on issue one that the Judgment Debtor is entitled to be heard in a Garnishee proceedings. He referred the court to the following cases:- NIGERIA BREWERIES LIMITED VS DUMUJE (2016) 8 NWLR (PT. 1513) 536; PURIFICATION TECHNIQUES VS A.G. LAGOS (2014) NWLR (PT. 879)665 and Section 36 of the Constitution, as Amended.

On issue two, counsel submitted that the Applicant's appeal having been entered on 3<sup>rd</sup> August, 2018, as per Exhibits A and B, the Court is without Jurisdiction to entertain any Application or further proceedings other than to vacate its order made on 14<sup>th</sup> November, 2018 and to decline Jurisdiction, vacate or discharge its order Nisi and strike out the proceedings for lack of jurisdiction/competence. Reliance was placed on the cases of DENTON WEST VS MOUMA. (NO citation); EZEOKAFOR VS EZEILO (1999)6 SCNJ AT page 218 and order 4 Rule 11 of Court of Appeal Rules.

On the appropriate order the court could make once it is without jurisdiction, counsel submitted that the court is only left with the legal duty of vacating, discharging or setting aside its garnishee order Nisi and terminating the entire Garnishee Proceedings. Counsel referred the court to Section 91 of the Sheriffs and Civil Procedures Act and Section 6 (6) (a) of the Constitution, as Amended as well as the case of M.M.B LTD VS JOHN EDGE & COY. LTD (1997) 10 NWLR 309 at 315, paragraph H.

Finally, counsel submitted that the instant Garnishee proceedings is abinitio incompetent and the court is without jurisdiction to entertain same. Therefore, counsel urged the court to grant the terms of the reliefs sought in the preliminary objection.

In opposing the preliminary objection, the Judgment Creditor/Respondent filed a 3 paragraphed counter affidavit deposed to by one Nneka Uchendu a written address dated 18<sup>th</sup> day of April, 2019.

In the said written address, the learned counsel to the Judgment Creditor/Respondent, Nneka Uchendu Esq formulated two issues for determination which are:-

1. Whether the judgment Debtor/Applicant can be heard in a Garnishee proceedings as in the instant case.
2. Whether the Applicant's appeal having been entered at the court of Appeal Abuja as Appeal No. CA/A/762/2018, this court is seized of jurisdiction to entertain any further proceedings or Applications before it other than to set aside and/or vacate its order made on the 14/11/2018.

In arguing the issues, counsel submitted that a judgment Debtor/Applicant cannot be heard in a Garnishee Proceedings as the Judgment Debtor/Applicant is not a Garnishee. That a Garnishee proceedings is strictly between the judgment Creditor and the Garnishee.

In her further submission, counsel stated that the judgment Debtor could only be seen and not heard and any action taken by the Judgment Debtor is considered in the eye of the Law as interloping, meddling or obstruction. Reliance was made to the cases of HON. MINISTER OF WATER RESOURCES AND ANOTHER

VS B. MARVIN INTERNATIONAL LTD AND ANOTHER (2016) NGCA 84; F.G.N VS INTERSTELLA COMMUNICATIONS LTD (2015) 9 NWLR (PT. 1463) 1 U.B.A PLC VS EKANEM (2010) 6 NWLR (PT.1190) 2007.

Moreso, counsel submitted that although the Sheriffs and Civil Process Act requires that the judgment Debtor be served with a copy of the Garnishee proceedings, the judgment Debtor is not a necessary party to a Garnishee proceedings. Reliance was placed on PACIFICATION TECHNIQUES (NIG) LTD VS ATTORNEY GENERAL OF LAGOS STATE (2004) 9 NWLR (PT. 879)665.

In another submission, counsel stated that the Garnishee proceedings is strictly between the judgment Creditor and the third party not a proceedings against Judgment Debtor directly. Counsel cited in support the case of NITEL PLC VS I.C.I.C (DIRECTORY PUBLISHERS) LTD (2009) 16 NWLR (PT. 1167) 356.

The learned counsel submitted also that the judgment Debtor/Applicant Objector has failed to satisfy this court by providing the proof of service of the notice of Appeal on the judgment Creditor/Respondent served before the commencement of the Garnishee proceeding and the grant of the order Nisi by this Honourable Court in November, 2018 and that the failure is fatal and fundamental. Counsel referred the court to the cases of ROSSEK VS ACB LTD (1993) 8 NWLR (PT. 312) 382 at 437; POPOOLA VS BABATUNDE (2012) 17 NWLR (PT. 1299) 302 at 331.

Finally on issue one, counsel submitted that the subsisting order of this Honourable Court should not be vacated and urged the court to answer issue one in favour of the Judgment Creditor/Respondent and dismiss the preliminary objection of the judgment Debtor/Applicant for lacking in merit and with punitive cost.

On issue two, counsel submitted that the Garnishee proceedings or attachment of Debt is a post Judgment proceeding for the enforcement of judgment and not a suit and that a Garnishee proceeding, is sui generis and different from other court proceedings, although it flows from the Judgment that financed the debt. That a judgment Debtor cannot be said to have entered an appeal in respect of the order Nisi (which is an interlocutory application) made by this Honourable Court. Counsel cited the cases of FIDELITY BANK PLC VS

OKINUOWULU & ANOR (2012) PELR-8497 (CA); PURIFICATION TECH. (NIG) LTD VS A. G LAGOS STATE (2004) 9 NWLR (PT. 879) 665; CITIZENS INT'L BANK LTD VS SCOA NIG. LTD (2006) 18 NWLR (PT. 1011) 332 U.B.A VS EKANEM (2010)6 NWLR (Pt. 1190) 207.

The learned counsel stated that for the court to vacate its order, the Applicant must place before this Honourable Court sufficient facts to warrant the grant of same. Counsel referred the court to paragraph 4 (iv-vii) of the affidavit in support of the preliminary objection and state that for the allegation of fraud and misrepresentation to succeed, the judgment Debtor Application/Objector must give the particulars of the fraud and the fraud must relate to matters which prima facie would be reason for setting aside an order if they were established by proof.

Consequently, counsel stated that the judgment Debtor/Applicant failed to back up the facts contained particularly in paragraphs 4 (iv-vii) of the affidavit in support and urged the court to expunge same. Reliance was placed on the cases of KAYDEE VENTURES LTD VS HON. MINISTER F.C.T (2010) ALL FNLR (PT. 519 1079 OKOYE VS C.P.M.B LTD (2018) 15 NWLR (PT. 110) 335; MAJA VS SAMDURIS (2002) 7 NWLR (PT. 765) 78.

In another submission counsel stated that regardless of the fact that an appeal has been entered by the Judgment Debtor/Applicant, the court is still vested with the jurisdiction to entertain the Garnishee proceeding as an appeal does not operate as a stay of execution. Moreso, counsel further submitted that it is the duty of the Court to ensure that a successful party is not denied the fruit of his victory unless there are compelling reasons to warrant doing so. Reference was made to the following cases:- PURIFICATION TECHNIQUES NIGERIA LIMITED VS ATTORNEY GENERAL OF LAGOS STATE (2004) 9 NWLR (PT. 879) Page 665 at 578; GRASEG (NIG) LTD VS R.T.T.B.C (2012) 13 NWLR (PT. 1316) 179; ENABULELE VS AGBONLAHOR (1994) 5 NWLR (PT. 342) 112; AKINNAWO VS OROTUSIN (2014) 15 NWLR (PT. 1431) 435 at 449 CA.

Consequently, counsel submitted that it is trite law that in cases of monetary judgment, the judgment sum ought to be deposited in an interest yielding account in custody of the registrar of court pending the determination of the appeal. Reliance was placed on BALOGUN VS BALOGUN (1969) 2 SCNLR 201,

UNIVERSITY OF ILORIN VS ADESINA (NO. 1) (2008) ALL FWLR (PT. 400) 709 CA; CAPPA LIMITED VS ATTORNEY GENERAL OF THE FEDERATION (2005) FWLR (PT. 182) 1848 CA.

Finally, counsel urged the court to dismiss the preliminary objection of the judgment Debtor/Applicant as same is lacking in merit.

On the otherhand, the defendant Applicant/Objector filed a further and Better Affidavit of 5 paragraphs deposed to by one Miss. Victoria Christopher a litigation Secretary in the Chambers of Agboegbulem & Co. Solicitors to the objector.

In his reply on points of law counsel submitted that Exhibit A being proof of service of the bailiff of the Court of Appeal, Abuja shows that the judgment Creditor was served with the record of appeal and not notice of appeal, on 29<sup>th</sup> March, 2019.

In his further reply on points of law, counsel submitted that by virtue of Section 132 (1) of the Evidence Act, no oral or affidavit Evidence can be given by the Judgment-Creditor to contradict the contents of Exhibit A. Reference was made to the case of DANTATA VS MOHAMMED (2012)14 NWLR (PT. 1319) page 122 (CA).

It was submitted that an affidavit shall not contain objection, prayers, legal argument or conclusion. Counsel referred the court to paragraphs 2 (iv) and (vi) and (viii) respectively and stated that these paragraphs offend the provisions of Section 115 (2) of Evidence Act and should be struck out and/or the court should discountenance same.

In another reply on points of law, counsel submitted that the judgment Creditor has not denied the contents of paragraphs 4 (vii) of the judgment-Debtors affidavit in support of preliminary objection and the deposition therein is deemed admitted. The consequence of which is that the judgment debtor being a party to the Garnishee proceedings is entitled to be heard. He cited in support the cases of ADEBIYI VS UMAR (2012) 9 NWLR (PT. 1305) 279; NIGERIAN BREWERIES LIMITED VS DUMUJE (Supra) and Section 20 and 75 of the Evidence Act.

Finally, counsel urged the court to decline jurisdiction as the judgment Creditor has admitted being served with the record of appeal on 29<sup>th</sup> March, 2019 and for the fact that appeal having been entered as appeal No. CA/A/762/2018 this court does not share jurisdiction with the court of Appeal.

Now, I have carefully gone through the notice of preliminary objection, the grounds upon which same was brought and the written address in support. I have also gone through the counter affidavit in opposition to the preliminary objection and the written address as well as the judgment Debtor/Applicant's further and better affidavit in response to the counter Affidavit.

I shall also adopt the two issues for determination formulated by the learned counsel to the Judgment Debtor/Objector in his written address and dwell on them accordingly.

On issue one which is whether the judgment Debtor/Applicant/Objector can be heard in a Garnishee proceedings as in the instant case, I will begin by saying that Garnishee proceeding is sui generis different from other court proceedings although it flows from the judgment that financed the debt. It should be noted that Garnishee proceedings are of two stages, first being the Garnishee order Nisi and second the Garnishee order absolute.

Having said this and before I proceed, let me refer to Section 83 (2) of the Sheriffs and Civil Processes Act which requires that a copy of the Garnishee order Nisi must be served on the judgment-debtor. Such service gives the judgment-debtor the right to be heard on whether the order Nisi should be made absolute.

Similarly, it was held in N.A.O.C VS OGINI (2012) 2 NWLR (PT. 1230) 131 at page 152-153 per OGUNWUMIJU that:-

***".....Where the court grants the order nisi on the Garnishee, the registrar though the Sheriff of the Court must serve on the Garnishee, the judgment Creditor and Judgment Debtor the order Nisi on form 26 of JER. The Registrar must then fix a date not less than 14 days of after the service of the order Nisi on the judgment Creditor, the judgment debtor and Garnishee for hearing. This subsequent hearing envisages an tripartite proceeding in which all interests are represented. That is when the***

***judgment debtor has the opportunity to convince the court to discharge the order Nisi by filing affidavits to that effect”.***

From the above, it is clear that judgment debtor in a Garnishee proceedings at the second stage can be heard. I so hold. In this respect see also the case of NIGERIA BREWERIES LIMITED VS DUMUJE (2010) 8 NWLR (PT. 1515) 536.

Consequently and without further ado, I hereby resolve the first issue in favour of the judgment Debtor and hold that the judgment debtor can be heard in a Garnishee proceedings.

That takes me to issue two which is whether the Applicant’s appeal having been entered at the court of Appeal- Abuja as appeal No. CA/A/762/2018, this court is seized of jurisdiction to entertain any further proceedings or Applications before it other than to set aside and/or vacate its order made on 14/11/18.

It is important to note at the onset that the law is settled that an appeal or filing of same does not operate as automatic stay. In this regard, I refer to the case of FIRST INLAND BANK PLC VS EFFIONG (2010) 16 NWLR (PT. 1218) 199 page 207 where it was held thus:-

***“.....Although filing an appeal does not ipso facto operate as a stay of execution of the decision appealed against, however where the appellant, in addition to the appeal, files an application for stay of execution or variation of the conditions for stay as imposed by the trial court, it becomes most desirable for both parties and the trial court, to ensure that a fait accomplis is not thrust upon the appellate court ....”***

Moreso, it was held in MOHAMMED VS OLAWUNMI & ORS (1993) LPELR-1898 (SC) per OGUNDARE J.S.C at 41-42, paragraphs C-A thus:-

***“It is true and correct to observe that a notice of appeal filed would not operate as a stay of execution and Section 24 of the Supreme Court Act makes this more clear, but, it is equally correct to point out that the Section does not prescribe in favour of any execution being carried out during the pending of an appeal.....”***



Now, in the instant case, it is true via Exhibits A&B attached to the supporting Affidavit to the preliminary objection as well as the Exhibits Attached to the further and better Affidavit that the Judgment Debtor/Objector has appealed the arbitral award and same has been entered with appeal NO. CA/A/762/2018.

Nevertheless, there is neither an order for stay of execution nor a motion seeking for same. However I have averted my mind to the fact that once an appeal is entered all pending applications should be transmitted by the lower court to the court of Appeal.

In the circumstances therefore, notwithstanding the fact that this Honourable Court has granted an order Nisi it is my considered opinion that in order not to overreach the court of Appeal and not to render any order or decision of the court of Appeal nugatory , it would be in order to stay further proceedings in this matter. I so hold.

In the final analysis, and as a mark of respect for court of Appeal, I hereby resolve again issue two in favour of the Judgment-Debtor/Applicant/Objector and stay further proceedings in this matter including the Garnishee Proceedings pending the outcome of the appeal filed before the court of Appeal. This is in the interest of Justice.

***Signed***

***HON. JUSTICE SAMIRAH UMAR BATURE***

***17/09/2020***

Counsel to Judgment Debtor/Applicant/Objector: We are grateful your Lordship.