

**IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY
IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT JABI, ABUJA**

BEFORE HIS LORDSHIP: HON. JUSTICE D. Z. SENCHI

COURT CLERKS: T. P. SALLAH & ORS

COURT NUMBER: HIGH COURT NO. 13

FCT/HC/CV/2627/18

DATE:20/5/2020

BETWEEN:-

CHIGOZIE CHIJOKE

...

CLAIMANT

AND

1. DEPUTY SHERIFF HIGH COURT OF THE FCT

2. ROSEMARY N. EMOVON

DEFENDANTS

JUDGMENT

The Plaintiff commenced this suit on 28th August, 2018 vide an originating summons accompanied with an affidavit of 13 paragraphs with three exhibits marked as exhibits A1, A2 and B and the Counsel's written address. By the originating summons the Plaintiff seeks the determination of the following questions:-

1. Whether by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the claimant in suit No. CV/109/2015 is not wrongful unlawful and illegal.
2. Whether by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the claimant in suit No. CV/109/2015 is not liable to be set aside.
3. Whether the claimant is not entitled to the immediate return of the claimant's said properties taken by the Defendants in

the wrongful, unlawful and illegal further execution levied against the properties of the claimant in suit No. CV/109/2015.

4. Whether the acts of the Defendant's wrongful unlawful and illegal further execution against the claimant's properties in suit No.CV/109/2015 is not acts for which the claimant is entitled to damages.

If the above questions are answered in the affirmative the Plaintiff then seeks against the Defendants as follows:-

1. A declaration that by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the claimant in suit No. CV/109/2015 is wrongful unlawful and illegal.
2. A declaration that by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the claimant in suit No. CV/109/2015 is liable to be set aside.
3. A declaration that the claimant is entitled to the immediate return of the claimant's said properties taken by the Defendants in the wrongful, unlawful and illegal further execution levied against the properties of the claimant in suit No. CV/109/2015.
4. A declaration that the acts of the Defendant's wrongful unlawful and illegal further execution against the Claimant's property in suit No.CV/109/2015 are acts for which the claimant is entitled to damages.
5. An order setting aside the further execution levied on the properties of the claimant in suit No. CV/109/2015.
6. An order that the Defendants pay to the claimant the sum of N10,000,000.00 (Ten Million Naira) only as general damages suffered by the claimant from the wrongful unlawful and illegal execution levied against the properties of the claimant by Defendants.
7. The cost of this suit.

On service of the originating summons and other processes on the Defendants, the 1stDefendant filed a counter Affidavit of 9 paragraphs with exhibits marked A-H series. The counter affidavit of the 1stDefendant is accompanied with a written

address dated 8th October, 2019 and filed on 4th November, 2019 with leave of Court granted on the 4th November, 2019. With the leave of Court granted on the 4th November, 2019 the 2nd Defendant filed a 5 paragraph counter affidavit with Counsel's written address dated 12th November, 2018.

On service of the processes filed by the 1st and 2nd Defendants on the claimant, the learned Counsel to the claimant filed a reply on points of law.

On the 15th January, 2020, Counsel to the respective parties adopted their written address and the case was reserved for judgment.

To determine the instant suit, learned Counsel to the claimant formulated and argued a sole issue in his address thus:-

"Whether by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the claimant in suit No. CV/109/2015 is not wrongful unlawful and illegal and by which reason the claimant is entitled to the reliefs sought."

The 1st Defendant's Counsel for his part formulated also an issue for determination in his address as follows:-

"Whether in the circumstance of this case, the Applicant is entitled to the reliefs sought."

The 2nd Defendant's Counsel distilled his issue for determination as follows:-

Whether or not the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 applies to the circumstances of this case.

Having set out the issues distilled for determination by Counsel to the respective parties, a close look at the Defendants' issues can be adequately collapsed under the Claimant's issue for determination. I shall therefore adopt the issue as distilled by the Claimant's Counsel as follows:-

"Whether by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the claimant in suit No. CV/109/2015 is not wrongful unlawful and illegal and by which reason the claimant is entitled to the reliefs sought."

The facts relied upon by the Claimant for his claim in this suit are as set out in his affidavit in support of his originating summons. Succinctly put, the Claimant averred that one B.I. Enunwa (now deceased) had, as Plaintiff, obtained judgment against the instant Claimant in Suit No. CV/109/2015. That the said B.I. Enunwa was still alive when the 1st Defendant levied the first execution against the properties of the Claimant, but died thereafter. It is the Claimant's averment that after the death of B.I. Enunwa, the Defendants issued processes in the name, for and on behalf of the late B.I. Enunwa to levy another execution against the Claimant on the judgment in Suit No. CV/109/2015. That the Defendants thus carried out fresh execution against the Claimant's properties on 18th August, 2018. Copies of processes issued in respect of the alleged execution are annexed to the Claimant's affidavit as Exhibits A1 and A2. That the Defendant's destroyed several other properties belonging to the Claimant. It is further the Claimant's case that leave of Court is required to carry out such further execution in Suit No. CV/109/2015 after the death of the judgment creditor and that such leave was not sought and obtained before the Defendants levied execution. He averred that he suffered tremendous damages from the Defendants' acts and he has made demands on the 1st Defendant vide Exhibit B.

In his counter affidavit, the 1st Defendant averred that on 17th February, 2017, the 2nd Defendant had on behalf of one Festus Azikagbon applied to the 1st Defendant for the enforcement of the judgment of the Chief District Court II, sitting at Wuse Zone 2, Abuja against the Claimant in Suit No. CV/109/2015. Copies of the application for execution and certificate of judgment are attached to the 1st Defendant's counter-affidavit as Exhibits A and B. Upon due process, the

1stDefendantapproved the enforcement of the said judgment. Exhibits B1 and B2 are writ of attachment and sale of goods dated 20th February,2017.The assistance of the Commissioner of Police, FCT Command was sought via Exhibit C for the execution which was subsequently carried out on 12th April,2017. Exhibits D1 and D2 are attached as copies of Inventory and Notice of sale. The 1stDefendantaverred that the 2ndDefendant later applied for a further execution of the judgment on the property of the Claimant on grounds that the total judgment sum was not realised from the first execution. The 2ndDefendant's application letters are annexed as Exhibits E1 and E2. The 1stDefendant thus approved further execution, and assistance of the Police was again obtained to carry out the execution of the judgment on 17th August,2018. Exhibits F1, F2 are copies of the writ of attachment and sale of goods, Exhibit G is letter to the Police while Exhibits H1, H2, H3 and H4 are Inventory and Notice of sale dated 17th August,2018. The 1stDefendant averred that due process was followed in all process regarding the first and second execution. That he had no dealing or interface with the judgment creditor and only dealt with the judgment creditor's solicitor who made the application.That the 1stDefendant or his staff are not aware of the purported death of the judgment creditor B.I. Enunwa at the time of carrying out the second execution nor was he (1stDefendant) put on notice or communicated to in respect of such death. That there was no order of Court or process staying or recalling the execution at the time of the execution.

The 2ndDefendant denied the Claimant's allegations. In her counter-affidavit, the 2ndDefendant averred that the parties in Suit No. CV/109/2015 were"MR. B.I. ENUNWA (suing by his attorney, Festus Azikagbon doing business in the name of Festus Azikagbon& Associate) V. Mr.ChigozieChijioke". That the said Festus Azikagbon was acting as an attorney over a property by power of attorney duly executed and by which he was empowered to sue third parties. The 2ndDefendant averred that Festus Azikagbon briefed the law firm of the 2ndDefendant to sue for arrears of rent and recover possession of the property subject of his power of attorney in 2015. That all actions carried out in respect of the property was authorized by the lawful attorney. That the death of Mr. B.I. Enunwa i.e. the

principal to Festus Azikagbon was not communicated to the 2nd Defendant and was unknown to her.

Arguing his sole issue for determination, learned counsel to the Claimant submitted that by the provisions of Order IV Rule 9(1)(A) of the judgment enforcement rules: Sheriff and Civil Process Act Cap. S6 Laws of the Federation 2004 the further execution levied on the properties of the Claimant in Suit No. CV/109/2015 is wrongful, unlawful and illegal and by which reason the Claimant is entitled to the reliefs sought in this suit. He posited that once a party to an execution dies, no further execution can be levied without the leave of Court. It is Counsel's submission that no leave was sought and obtained before the Defendants levied further execution on the Claimant's properties in respect of a judgment of which the judgment creditor B.I. Enunwahad died. He further argued that Court processes cannot be issued in the name of or on behalf of a dead person but Exhibits A1 and A2 were issued by the Defendants in the name of the dead judgment creditor. He contended that any step contrary to provisions of the law is null and void and must be set aside while the innocent party is entitled to damages. He finally urged this Court to grant the reliefs sought by the Claimant in this suit.

On the otherhand, learned Counsel to the 1st Defendant submitted in his written address that Exhibits E1, E2, F1, F2 and F3 which are Court processes in the execution carried out by the 1st Defendant are sufficient proof that he had authority to carry out the execution complained of in this case. Counsel relied on Section 43 of the Sheriffs and Civil Process Act and Section 2 of the Practice Direction for the Enforcement Unit of the High Court of the Federal Capital Territory Abuja 2016. He contended that as the 1st Defendant had no knowledge or notice of the purported death of the Judgment Creditor or any order staying or recalling the execution, the 1st Defendant rightly carried out the execution. Counsel finally urged this Court to dismiss the Claimant's suit for lacking in merit and with substantial cost.

For his part, Counsel to the 2nd Defendant argued in his address that a power of attorney is a formal instrument which

empowers another to act on behalf or instead of a person and when given for valuable consideration or expressed to be irrevocable, such power cannot be revoked by the donor either by his death or legal incapacity. Counsel relied on Section 8(1)(i) and (ii) of the Conveyancing Act, 1882 and a plethora of decided cases including **UBA V, REGISTRAR OF TITLES (1973) 3 CCHCJ P. 52 and LABABEDI V. ODULANA (1973) 4 CCHJ 98**. Counsel concluded by urging this Honourable Court to dismiss this suit for lacking in merit.

Replying the 2nd Defendant on points of law, the Claimant's Counsel pointed out that where a person sues through his attorney, it is not the attorney that is the Plaintiff in the case but the donor of the power. He contended that the 2nd Defendant cannot be heard to say that she did not know that her client was dead at the time she took steps in respect of the second execution. He submitted that interest cannot be enforced in the name of a deceased donor. He posits that 2nd Defendant's power of attorney is not supported by any consideration. Learned Counsel submitted that Festus Azikagbon who was attorney of Mr. B.I. Enunwa (deceased) is not an administrator of the estate of said deceased.

Now having adopted the claimant's sole issue to resolve the instant suit, it is important to first and foremost reproduce the provisions of **Order IV Rule 9(1)(a) of the Judgment (Enforcement) Rules** under which the claimant principally anchored his questions. It provides thus:-

9. Execution by leave in special cases

- (1) In the following cases, namely –
- (a) Where any change has taken place by death or otherwise in the parties entitled or liable to execution:
 - (b) Where a husband is entitled or liable to execution upon a judgment for or against his wife;
 - (c) Where a party is entitled to execution upon a judgment of assets in future,
 - (d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recorded against such company, or against a public officer or person representing such company.

The party alleging himself to be entitled to execution may apply to the Court for leave to issue process accordingly. The Court may, if satisfied that the party so applying is entitled to execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in any action may be tried. And in either case the Court may impose such terms as to costs and otherwise as shall be just.

From the foregoing provision, it is clear that one of the situations in which leave of Court ought to be sought is where execution is to be levied in respect of a judgment in which the judgment creditor/debtor has since died. See also the case of **TECHNIP V. AIC LIMITED & ORS (2015) LPELR-25386(CA)**. The person who is tasked under the provision to bring the application for leave is the person who claims to be entitled to the judgment.

Now I have looked at the affidavit evidence of parties before the Court. There seems to be no dispute that there was a judgment against the Claimant in a suit No. CV/109/15 (or CV/1092/15 as the Defendant's put it) which judgment the Defendants executed against the Claimant on two occasions. The Claimant's allegation is that the judgment creditor of that judgment (one B.I. Enunwa) had however died before the second execution was levied against him. While the Defendants made general denials in their counter-affidavits averred that they were not aware of the judgment creditor B.I. Enunwa's death as at the time of the second execution against the Claimant.

On the applicability of **Order IV Rule 9(1)(a) of the Judgment (Enforcement) Rules** to the instant suit, Counsel to the 2nd Defendant is wont to posit that by virtue of a power of attorney upon which the suit (in which the judgment executed was obtained) was instituted, the death of B.I. Enunwa the donor (of the power) was irrelevant as a power of attorney, when given for valuable consideration or expressed to

be irrevocable, cannot be revoked by the donor either by his death or legal incapacity.

The general position of the law is that a power of attorney is ordinarily revocable and automatically terminates upon the death or incapacity of the principal or donor. See the case of **OKPE V .UMUKORO (2013) LPELR-21999(CA)**. The exception is where the power of attorney is given for valuable consideration or expressed to be irrevocable. Whether or not a power of attorney is given for valuable consideration or expressed to be irrevocable is a matter of fact which ought to be pleaded and proved. In the instant case, the 2nd Defendant did not even allege in her affidavit that the power of attorney she is relying on was given for valuable consideration or expressed to be irrevocable. No such fact is before this Court. She did not attach a copy of the said power of attorney as exhibit to her counter-affidavit. The 2nd Defendant's Counsel's argument on irrevocability by death of powers of attorney go to no issue and cannot avail the 2nd Defendant in the circumstances. Such argument is misconceived and accordingly discountenanced.

The circumstances of this case show that leave of Court ought to have been sought and obtained by the 2nd Defendant for the purpose of levying the second (further) execution against the Claimant in respect of a judgment of which the judgment creditor (one B.I. Enunwa) had died. No such leave was obtained. The execution complained of had however already been levied and carried out as at 18th August, 2018 by the Defendants.

Attention must be drawn to the fact that the provision upon which the Claimant has based his complaint of unlawful execution is a rule of practice and procedure of this Court. **Order IV Rule 9(1)(a) of the Judgment (Enforcement) Rules** does not mean that judgment of Court cannot be executed where a judgment creditor dies. The effect of the provision in my opinion is simply to ensure that the proper party carries out execution where the judgment creditor dies. In the case of **TECHNIP V AIC LTD (supra)** the Court of Appeal held thus:-

" My humble understanding or appreciation of the above set out provision is that in any of the situations listed in subrule 1(a),(b),(d), a judgment creditor may apply to the Court for leave to issue process necessary for the recovery of the judgment debt and (as pertaining to sub-rule 1(a1) from the subrogee of the original judgment debtor where upon such application for leave, the Court is satisfied that the judgment creditor is entitled to execution, it will then proceed to make an order granting leave for the relevant process to be issued"

The Court of Appeal further held:-

" It seems to me that from the literal and straight forward interpretation of the provision of order iv Rule 9(1) (a) that cognizance is taken of the fact that controversy may arise over any subrogation upon death or otherwise of the judgment debtor given that there must be certainty or correctness of the party sought to be made a subrogee."

Now it appears from the simple interpretation of order iv Rule a(i) (a), even though the rule envisages either party to the judgment that wants to levy execution of the judgment in the event of death to apply for leave in order to avoid controversy where the subject matter of execution might be in the hands of third party or heirs of the deceased and for the execution to be transparent and fair, such leave becomes necessary in order to determine any controversy that might arisen in the execution. However, in the instant case the judgment debtor in this case is the claimant. The first phase of execution had already been carried out but such execution could not satisfy the judgment. The 2nd phase of the execution in order to satisfy the judgment against the claimant had also been carried out. The only grouse of the claimant against the 2nd levy of execution is that the judgment creditor is dead. There is no controversy as to the subject matter of execution to satisfy the judgment.

Thus, breach of a rule of practice and procedure does not render proceedings a nullity but merely an irregularity and a party must show that his rights have been affected or that he has suffered any miscarriage of justice. See the case of **SAMUEL OSIGWE V. PSPLS MANAGEMENT CONSORTIUM**

LTD & ORS (2009) 3 NWLR (PT.1128) P. 378; (2009) LPELR-2807(SC). The claimant in his affidavit evidence did not depose to facts to show that he has suffered any miscarriage of justice in the 1st Defendant levying execution on the two occasions

More to the point, the position of the law is that a Court will not set aside a writ of attachment which has been levied or executed except in exceptional circumstances where the issuance of a writ of execution or attachment amounts to an abuse of the Court's process or over-reaching the other party. – see the case of **ARGOS (NIG.) LTD. V. UMAR (2002) 8 NWLR (PT. 769) P. 284.**

Has abuse of Court process or substantial miscarriage of justice been established by the Claimant in this suit so as to convince this Court to set aside the execution which has already been carried out?

In their defence, the Defendants say that they were not aware of the death of the judgment creditor (B.I. Enunwa) at the time of the second execution of the judgment against the Claimant. The 2nd Defendant is counsel to the judgment creditor who had sued through an attorney. The 2nd Defendant had been dealing with the attorney of the judgment creditor and did not know of the judgment creditor's death at the material time. The 1st Defendant is empowered by law to execute judgments of Court and tendered documents to show that due process was followed by him in the execution against the Claimant. He also did not know of the death of the judgment creditor at the material time.

Counsel to the Claimant has in his reply on points of law contended that the 2nd Defendant cannot be heard to say that she did not know that her client was dead at the time of the second execution. The Claimant however did not file a further affidavit to address the fact. I have looked at the circumstances as deposed by the 2nd Defendant in her counter-affidavit. The facts are credible that she may not have known of the judgment creditor's death since she dealt with his attorney. The Claimant ought to have filed a further affidavit in

order to discredit this new material fact and exhibit evidence of death. The Claimant in this case did not do so. The Claimant also did not tell this Court when exactly the said judgment creditor (B.I. Enunwa) died for this Court to come to the conclusion that owing to the period between his death and the time of the 2nd Defendant's application for the second execution, the 2nd Defendant ought to have known or could have had constructive notice of his death. This Court is thus left with no choice but to believe the 2nd Defendant that she had no knowledge of the judgment creditor's death as at the time of the second execution.

As i said earlier whether abuse of Court process has occurred in this case, it must be noted that abuse of Court process simply means that the process of Court has been used *mala fide* with the sole intention to irritate the other party. See the cases of **ARUBO V. AIYELERI (1993) 3 NWLR (PT. 280) P. 126** and **OJUMO & ORS V. ADALEMO & ORS (2010) LPELR-9012(CA)**. I have looked at the reasons given by the Defendants for failure to obtain leave of Court before the second execution against the Claimant in compliance with **Order IV Rule 9(1)(a) of the Judgment (Enforcement) Rules**. I do not believe that the purpose of the execution was to irritate or annoy the Claimant.

Further to the above, the Claimant in this case has failed to show exactly how he has been overreached or what substantial injustice he has suffered as a result of the irregularity in carrying out the second execution without leave of Court. His averment that some of his other properties were damaged during the execution was denied by the Defendants (particularly the 2nd Defendant). The Claimant also did not disclose in his affidavit which properties exactly were damaged. The allegation that some of his other properties were damaged during the execution is thus unfounded and unsubstantiated.

Pursuant to all the foregoing, I cannot come to the conclusion that the Claimant has established that the second execution against him by the Defendants is an abuse of Court process in the peculiar circumstances of this case. The Claimant neither alleged nor established collusion or fraud on the part of the

Defendants in the second execution. Neither has the Claimant established that he has suffered any miscarriage of justice or that the second execution against him has an overreaching effect on him, thus requiring the setting aside of the execution already carried out by the Defendants against him. It is noteworthy that the Claimant has not stated that he challenged the judgment that gave rise to the second execution in any way or by appealing against same.

In conclusion, I am of the view that the Claimant has failed to make a case for setting aside of the second writ of execution and eventual execution against him by the Defendants. The instant action ought to fail in the circumstances. Accordingly therefore, the sole issue for determination is hereby resolved in favour of the Defendants and against the claimant and the instant suit is hereby dismissed.

HON. JUSTICE D. Z. SENCHI
PRESIDING JUDGE
20/05/2020

Parties: -Abent.
M.NonyeOkpor: -For the claimant.
TolaOlarunfunmi: -For the 1stDefendant.
Charles Ossege: -For the 2nd

Sign
Judge
20/05/2020