IN THE HIGH COURT OF THE FEDERAL CAPITALTERRITORY

IN THE ABUJA JUDICIAL DIVISION

(APPELLATE DIVISION)

HOLDEN AT HIGH COURT NO. 15 APO, ABUJA

ON THE 14TH DAY OF OCTOBER, 2020

BEFORE THEIR LORDSHIPS

HON. JUSTICE S. BBELGORE: PRESIDING JUDGE
HON. JUSTICE B. MOHAMMED: HON. JUDGE

APPEAL NO. CVA/383/2019
CVA/384/2019
SUIT NO: CV/22/2019

BETWEEN:

FIRST CITY MONUMENT BANK ..... APPELLANT

AND

1. **ANIZOBA OJIAKOR**
2. **MRS. SAMSON MUSA** **.....RESPONDENTS**
3. **MR. CLETUS BIJIMI**

JUDGMENT

Before this Honorable Court is two Appeals i.e. Appeal 383/19 and 384/19. On the 14/7/2020, Counsel for the Appellant pray this court to consolidate the two Appeals on the ground that one judgment of this honorable court will suffice issues raised for determination in both Appeals. The prayer was granted accordingly.

The Appeal is against the decision of the Chief District Court Abuja presided over by His Worship Hon. Taribo Z. Jim which was delivered on the 4th day of September, 2019; wherein the learned trial court made a Garnishee Order Absolute against the Appellant.

The Appellant dissatisfied with the proceedings and the pronouncement made by the learned trial judge filed this Appeal vide Notice and Grounds of Appeal dated and filed on the 19th day of November 2019 complaining on one ground of appeal.

GROUNDS OF APPEAL

The learned trial magistrate erred in law and occasioned miscarriage of justice it assumed jurisdiction to hear the garnishee proceedings and proceedings and proceeded to make the order absolute when the judgment debtor was not served with the garnishee order nisi nor hearing notices of the garnishee proceedings.

RELIEF SOUGHT

1. AN ORDER allowing this Appeal
2. AN ORDER setting aside the garnishee order absolute made by the chief district court of the Federal Capital Territory on the 4th day of September, 2019 in suit no: AB/DC/CV/22/2019 Between ANIZOBA OJIAKOR V. SAMSON MUSA & ANOR V. FIRST CITY MONUMENT BANK PLS (AS GARNISHEE)

According to the Appellant throughout the period when the matter was going on at the trial court, there was no record of the

proof of service or attempt at service of the garnishee order nisi on any of the Judgment Debtors. And it is based on the issue of non-service on the Judgment Debtors that the Appellants Appeal to this court and formulated a sole issue for determination and that is":-

Whether trial court had the jurisdiction to make the garnishee order absolute?

Learned counsel for the Appellant submitted that the application for a garnishee proceeding filed by judgment creditor/respondent's counsel was brought pursuant to the Sheriffs and Civil Process Act, 1945 LFN, CAP S6, 2011 and the judgment enforcement rules made pursuant to Section 94 of the Sheriff and Civil Process Act, while part V of the Sheriffs and Civil Process Act and Order VIII of the Judgment Enforcement Rules both regulate the procedure and proceedings for attachment of debt by garnishee order, Section 83 of the Sheriffs and Civil Process Act Supra is the main provision on method of commencement of garnishee proceedings.

Learned counsel for the Appellant explaining the provision of Section 83(1) and (2) of the Sheriffs and Civil Process Act submitted that the 1st stage involves the Judgment Creditor commencing the proceedings by way of an Ex-parte Application. And that the second stage involves the Condition Precedent that must be fulfilled before an Order Nisi is made Absolute by the Court. Learned Counsel contended that the trial court did not have jurisdiction to make the Garnishee Order Absolute in that the Judgment Debtors were not served with the Order Nisi.

Learned Counsel for the Appellant placed reliance in the locus classicus case of **MADUKOLU V. NKEMDILIM (1962) 2 SCNLR 341**. Wherein counsel for the Appellant relied on the 4th principle stated in the above case that is

"Condition precedent to the exercise of a court's jurisdiction must be been fulfilled"

Counsel stated that the lower court assumed jurisdiction when in fact the Judgment Debtors were not served with Order Nisi as provided by section 83(2) of the Sheriff and Civil Process Act.

Counsel contended further that it is trite law that where a statute has prescribed the mode/procedure of performing an act, only that mode or procedure of performing the act completely is contemplated otherwise; the act will be a nullity. He added that any mandatory provision of a statute must be followed religiously and not even the parties to a case or the court can waive same. Counsel cited the case of **ABUBAKAR V NASAMU (NO.2) (2012) 17 NWLR PART 1330PG 590** amongst others.

Learned counsel for the Appellant stated that in the instant case, the Judgement Debtors were not served with the order nisi or were they notified of the pendency of the garnishee proceedings. Learned counsel cited the case of **NIGERIAN BREWERIES PLC V. DUMUJE (2016) NWLR (PT.1515) 536 AT PP.598-599, PARAS C-B,PP.600. PARA H, WEMA BANK PLC V. BRASTEM-STERR(NIG.) LTD (2011) 6 NWLR (PT.1242)58 at p.79 PARA D-F**

Learned counsel added that from the above cited cases, service of mandatory process is fundamental to the jurisdiction of the

court when there is specific provision that a party is to be served in a specific manner and it is not served; the jurisdiction of the court against that party has not been invoked.

Counsel argued that even the proof of service transmitted in this court by the 1st Respondent shows that though an attempt was made to serve only the 2nd Judgment Debtor, the said 2nd Judgment Debtor was still not served.

Counsel referred the court to order VI of the District Court Rules and District Court Laws of Northern Nigeria which provides that:-

" Where any summons or other processes issued from a court is served by a sheriff or such other person as may be appointed by court, the service may be proved by endorsement on a copy of the summons or process under the hand of the sheriff or such other person showing the fact and mode of service"

Counsel cited plethora of cases to buttress his contention on the importance of service, where it was stated that failure to give notice of proceedings to an opposing party in a case where service of court process is required is a fundamental omission capable of rendering such proceedings void, because the court will have no jurisdiction to entertain such matter see the case of **HALID PHARMACEUTICAL LTD V. SOLOMON (2015) 5 NWLR (PT.1453) 565 AT PG 585** amongst others cited by the learned counsel for the Appellant.

In conclusion counsel submitted that any trial without jurisdiction is a nullity the reason why it can be raised at any stage of the case. Learned counsel submitted that having shown that the trial court has no jurisdiction to make the garnishee order absolute,

counsel urged this honorable court to allow this appeal and to grant the prayers of the Appellant sought as per the Notice of Appeal.

On the other hand the 1st Respondents filed its brief of argument dated and filed 2/3/2020. Learned counsel formulated a sole issue for the determination of this honorable court and that is:-

"Whether the Garnishee/Appellant has locus standi to play the role of an advocate for the judgment debtors by raising the issue of service and address for service on behalf of the 1st and 2nd judgment debtors/2nd and 3rd respondent premised on the two grounds in their notice of appeal and argue same in their appellant brief of argument"

Learned counsel for the 1st respondent started his argument with the issue of locus standi; wherein he submitted that locus standi means the right to bring an action to be heard in court or to address the court on a matter before it. Counsel cited the cases of PRINCE ADEMOLU ODENEYE VS PRINCE DAVID OLU EFUNUGA SC 288/1988. He added that the effect of lack of locus should be applied in the determination of this appeal. Counsel contended that the Garnishee does not have the locus standi to raise the issue of service and or address for service on the Judgment Debtors because the Garnishee is neither the Judgment Debtor nor their counsel and should not be allowed to fight the cause of the Judgment Debtor. Counsel stated that the duty of a Garnishee in law is to show cause why a Garnishee Order Nisi should not be made Absolute against them and having failed to file an affidavit to show cause have no right whatsoever in law to

raise any issue on behalf of any other party in this suit. Learned counsel placed reliance on the case of **GUARANTY TRUST BANK PLC V INNOSON NIG LTD (2017) 16 NWLR(P 1591) 181 AT 203 PARA D-F, CENTRAL BANK OF NIGERIA V INTERSTELLA COMMUNICATION LTD AND 3ORS (2018) 7 NWLR (PT 294), OCEANIC BANK PLC VS MICHAEAL OLADEPO (2013) 8 WRN 157 AT 17**

On the second issue raised for determination by learned counsel for the 1ST Respondent that is "whether the trial court was right in refusing to set aside the garnishee order absolute"

Learned counsel submitted that the test to be applied in determining whether an order of court is final or an interlocutory one is to look at the order made and not the nature of the proceedings. If the rights of the parties are finally determined by the order then the decision is final. Counsel placed reliance in the case of **BAUHAUS INTERNATIONAL LTD & ANOR V MIDFIELD INVESTMENT 2008 LPELER(CA) See also the case of AKINSAYA VS UBA LTD (1986) 4 NWLR (PT 35) 273** the test which was approved by the supreme court is the one which looks at the order made when it cited with approval the decision of the court of appeal of England in the case of **BOZSON V ALTRINCHAM UDC (1903) 1 KB 547 at 548** wherein the learned chief justice of England stated the test question thus " does the judgment or order, as made finally dispose of the right of the parties, if it does, then the order is final order, if not it is interlocutory. Counsel explained further that what is important is the nature of the order made because if from

the other made there is no further reference made to the court, the decision is a final one likewise an order or judgment which at once affects the status of the parties ought to be seen as final.

Learned counsel submitted that the decision of the apex court is that a decree nisi made absolute made by a district court judge is a final order and cannot be set aside by the same court who has become functus officio see the case of **UNION BANK OF NIG V BONEY MARCUS IND LTD AND 2 ORS (2005 ALL FWLR PT 278 P 1037 AT P 1047** PARAGRAPHS D-E KATSINA ALU JSC, **ZENITH BANK PLC V JOHN(2015) NWLR (PT 1458) 393**

Learned counsel urged the court to affirm the decision of the trial court when it held that it has become functus officio on the Garnishee Order Absolute and cannot therefore set aside the order.

On the issue of non-service of the Order Nisi in the Garnishee proceedings on the judgment debtors learned counsel for the Applicant referred the court to pages 1, 1a, 2, 2a, 3, 4, 5, 5a, 6, 6a, 7, 8, and 8a, 9, 9a, respectively of the supplementary record. Counsel added that a party alleging the actual imminent breach must show clearly from the facts of the case that his right has been violated, or in the verge of being violated and not for any other person to do on behalf of that party. Learned counsel submitted that from the facts stated in the supplementary record, the appellant lack the locus standi to establish non service of the order nisi on the Judgment Debtors. Counsel placed reliance in the case of **NIGERIAN ARMY VS MAJOR JACOB IYELA(2009) ALL FWLR PT 452 P 1012 AT P1-26-1027**

We have carefully studied this Appeal and plethora of issues were raised by both parties however this court has carefully selected two issues that calls for determination of this Appeal and the first is:-

"Whether the trial court has the jurisdiction to make the garnishee order absolute based on the facts presented before this honorable court."

A garnishee proceeding is governed by the Sheriffs and Civil Process Act and to be specific Section 83 (1) and (2) of the Act. By the provision of Section 83(2) the law provides that at least fourteen days before the day of hearing, a copy of the Order Nisi shall be served upon the Garnishee and on the Judgment Debtor. That is, for the Judgment Creditor to properly commence or initiate the Garnishee Proceeding in accordance with due process of law and in other to invoke and vest the court with the requisite jurisdiction to entertain and adjudicate over such proceedings, the judgment creditor must comply with the provisions by serving a copy of the order nisi on the garnishee and judgment debtor at least 14days before the hearing. In other words any action initiated in breach or in contravention of the provision of section 83 Sheriff and Civil Process Act would not be one initiated or commenced by due process of law.

As earlier mentioned the issue of serving hearing notice of the Order Nisi is provided for in a statute, a procedural provision which gives the parties in whose favor same was provided the right to be notified. And where there is no due compliance with the provisions the court will look into the substance of the facts of

each case. Should non-compliance arise in certain procedural provisions, a party has two options whether to complain of such breach or a party may voluntarily waive the right by choosing not to complain when such right is breached.

In the case of MOBIL PRODUCING NIG UNLIMITED V LAGOS STATE ENVIRONMENTAL PROTECTION AGENCY the apex court held that the right to be served with a pre-action notice does not fall within the category of rights which cannot be waived.

From the above, this honorable court is of the opinion that if the Judgment Debtors did not complain of non-service of the garnishee Order Nisi then it would be right to say that they have waived such right and by so doing have vested the trial court with the requisite jurisdiction over the Garnishee Proceedings. It should be noted that matters affecting the jurisdiction of a court is of two types one that affects the public and that which affects the individual, whilst the former cannot be waived, i.e. the filing an action in a wrong court of law; on the other hand the latter can be waived, i.e. the non-service of a hearing notice or a pre action notice which is personal, private or domestic to the party who ought to have been served.

In the extant matter, the Judgment Debtors are the beneficiaries of the service and so can waive it at will or on their own terms. If the Judgment Debtors decide not to raise the issue of non-service of the hearing notices even after the garnishee communicated to them of the matter at the trial court. It is the right of the judgment debtors to raise issue of non-service timeously or they may decide to forgo same.

In the case of Ariori v. Elemo (1983) 1 SC, 13 @ 25, waiver simply means the intentional and voluntary surrender, abandonment or relinquishment of a known privilege and/or right by a party/person who could otherwise be entitled to insist on the benefit of the fight/privilege.

In the circumstance where the Judgment Debtor decide to object to the competency of the proceeding on the ground of non-service of the order nisi which is a sort of condition precedent, it cannot be said to have waived such right.

The next issue for determination is who can raise the issue of non-service of the order nisi on the judgment debtor.

In the extant matter, it is the Appellants that raise the issue of non-service of the Order Nisi on the Judgment Debtors.

The Appellants at page 24 of the Supplementary Record of Appeal in the affidavit attached to Motion 66/2019 averred that they have contacted the Judgment Debtors and they (judgment debtors) informed the Appellant (garnishee) that they are not aware of the Garnishee Proceeding at the trial court. I have clearly examined the aforementioned motion paper dated 6/11 /2019 almost a year from now. It is surprising that the Judgment Debtors fail to raise objection till date.

What is more surprising or rather strange and unusual to this Honorable Court is that the Appellant is making an issue without any proof of evidence that it is acting on behalf of the Judgment Debtors.

The position of the law is clear that it is the party not served with the hearing notice after proof of same that can apply to set aside whatever order that was made against it in its absence based on right he has over the court by the principle of ex debito justitiae.

We are therefore in agreement with the learned counsel for the 1st Respondent that the Appellant has no locus standi to bring the issue of non-service of the order nisi on the Judgment Debtor.

And since the Judgment Debtor has failed to come forward to complain of non-service timeously then it can be said that they have waived such right as provided by **Order 83(2).**

The prayers of the Appellant sought as per the Notice of Appeal fails in its entirety and is hereby dismissed the ruling of the trial court is affirmed by this Honorable Court.

HON. JUSTICE S. B.BELGORE HON. JUSTICE B. MOHAMMED
(Presiding Judge) (Hon. Judge)
14/10/2020 14/10/2020