

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

**IN THE ABUJA JUDICIAL DIVISION**

**HOLDEN AT GUDU - ABUJA**

**ON THURSDAY THE 30<sup>TH</sup> DAY OF MARCH, 2022.**

**BEFORE HIS LORDSHIP; HON. JUSTICE MODUPE OSHO -ADEBIYI**

**SUIT NO. CV/1035/2020**

**ARGIJI PROPERTIES LTD----- JUDGMENT CREDITOR/APPLICANT**

**AND**

- 1. RAYMOND ONYEUGO (Trading under the Name and style of accurate solicitors) ----- JUDGMENT DEBTOR**
- 2. WEMA BANK**
- 3. FIRST BANK**
- 4. ACCESS BANK**
- 5. DEPUTY SHERRIF, FCT HIGH COURT ----- RESPONDENT**

**RULING**

Before this court are two Motions, the 1<sup>st</sup> one dated and filed 22/10/2021 with No. M/7078/2021 by Judgment Creditor/Applicant praying for AN ORDER varying the order nisi of this Court made on the 23<sup>rd</sup> day of September, 2020 by substitution, the sum of N6, 730,300 (Six million, seven hundred and thirty thousand, three hundred naira) which is the purported judgment sum calculated by the Judgment Creditor/Applicant to the sum of N9, 640, 000 (Nine million, six hundred and forty thousand naira) being the actual balance judgment sum and the second Motion is dated and filed 23/2/2021 with No. M/1758/2021 by Judgment Debtor/Applicant praying for An order of this Honourable Court setting aside its order of garnishee Nisi granted on 14<sup>th</sup> October, 2020 for misrepresentation of facts.

I will take the application for variation of the order Nisi first. The motion is brought pursuant to Order 25 Rule 7 of the Rules of this Court. The Judgment Creditor/Applicant seeks the following reliefs:

1. AN ORDER varying the order nisi of this Court made on the 23<sup>rd</sup> day of September, 2020 by substitution, the sum of N6, 730,300 (Six million, seven hundred and thirty thousand, three hundred naira) which is the purported judgment sum calculated by the Judgment Creditor/Applicant to the sum of N9, 640, 000 (Nine million, six hundred and forty thousand naira) being the actual balance judgment sum.
2. And for such further order or orders as this Honourable Court may deem fit to make in the circumstance of this case.

In support of the Motion is an affidavit of 19 Paragraph deposed to by John Abah, Legal Practitioner in the law firm of Baron and Stagger Chambers representing the Judgment Creditor. He deposed that Judgment was given in Suit No. CV/015/15 against the Judgment debtor/Respondent on the 4<sup>th</sup> day of July, 2018. That when the judgment debtor/Respondent refused to satisfy the judgment sum, the judgment creditor/Applicant approached the Sheriff department of this Honourable Court for the enforcement of the said judgment by way of a writ of *fifa* which was executed. That the properties acquired from the Judgment debtor/respondent were sold by auctioneers at the sum of N59, 850.00 (Fifty-nine thousand, eight hundred and fifty naira which was not sufficient to satisfy the judgment debt. That on the 8<sup>th</sup> day of October, 2020, the Judgment Creditor/Applicant instituted this proceeding to recover the outstanding judgment sum. That in the calculation of the judgment sum, the Judgment Creditor/Applicant wrongly calculated the sum of N6, 730,300 (Six million, seven hundred and thirty thousand, three hundred naira) instead of N9, 640, 000.00 (Nine million, six hundred and forty thousand naira). That it was in response to the order of Court on the 13<sup>th</sup> of October, 2021 for a recalculation of the judgment debt that the counsel to the Judgment Creditor discovered the error. That this application is brought to ensure that the amount sought by the Judgment

Creditor/Applicant in this suit is in tandem with the actual outstanding judgment sum. That the Judgment debtor/Respondent will not be prejudiced by the grant of this application and it would be in the interest of justice that the Judgment Creditor/Applicant's application is granted. Attached to this application are three (3) Exhibits; certificate of judgment marked exhibit AP1, auction sale report dated 27/2/2019 marked exhibit AP2 and writ of attachment marked exhibit AP3. Annexedis a Written Address wherein learned counsel raised a sole issue for determination to wit;

“Whether the Order of this Honourable Court can be varied”

Summarily Learned counsel submitted that the discrepancy in the figures is an obvious mistake which the Court has powers to look into, in a bid to do substantial justice to parties as the instant Order Nisi does not fully represent the judgment which the court seeks to enforce. Counsel further submitted that an order made by a court can be varied so as to fully represent the intention of the Court. He relied on the cases of **DINGVADI V. INEC (2011) LPELR-950 (SC)**; **Nigerian Army v. Iyela (2008) LPELR 2014 SC** and that **Order 25 Rule 7 of the Rules of Court** empowers the court to vary the order of 23<sup>rd</sup> of September, 2020 to be in tandem with the intendment of the Judgment delivered on the 4<sup>th</sup> day of July, 2018 in suit no: CV/015/15.

In opposition, Judgment Debtor filed a counter-affidavit of 9 Paragraph on 1/11/2021 deposed to by Gloria David, counsel in the law firm representing the Judgment Debtor. Counsel averred that the Certificate of Judgment attached as Exhibit API does not represent the true state of affairs as it relates to the judgment of the District Court. the sum accrued to the Judgment Creditor from the judgment is not up to the sum of N9,640, 000 (Nine Million, Six Hundred and Forty Thousand Naira). That the judgment has been fully realized when the judgment Creditor through the Enforcement unit of this Honourable Court attached and removed all the properties in his office and sold them in satisfaction of the judgment sum. That the 5<sup>th</sup> Respondent and the Auctioneers compromised the valuation

and sale of the Judgment Debtor's properties in arriving at the ridiculous amount of N59,850.00 (Fifty-Nine Thousand, Eight Hundred and Fifty Naira) allegedly realized from the auction sale without regards to any established procedure or rules. That the judgment sum being N9,640, 000 (Nine Million, Six Hundred and Forty Thousand Naira) sought to be enforced does not reflect the figures in exhibit API. That this Honourable Court did not order the judgment Creditor's Counsel to recalculate the judgment sum on the 13<sup>th</sup> October, 2021. That the sum of N9, 640, 000 (Nine Million, Six Hundred and Forty Thousand Naira) sought to be substituted is an afterthought. That this application is brought to further mislead this Honourable Court into varying its order in favour of the Judgment Creditor. That it will be in the better interest of justice to refuse this Application.

Attached to this application are three (3) Exhibits; invoice dated 29/05/2014 marked exhibit A; certificate of judgment marked exhibit B and certificate of judgment marked exhibit C. Annexedis a Written Address wherein learned counsel raised a sole issue for determination to wit;

“Whether from the facts and circumstances of this Application, this Court is not functus officio with regards to the reliefs sought by the Judgment Creditor and whether the facts are accurate and support the grant of the application”.

Summarily, learned counsel submitted that this Honourable Court has become functus officio with regards to the reliefs sought by the Judgment Creditor in this application as such, the Court lacks the requisite jurisdiction to grant the reliefs. Counsel further submitted that the provision of Order 25 Rule 7 relied upon by the Judgment Creditor in seeking the reliefs only operate to cover any perceived mistake or error that is attributable to the Court and not to the Judgment Creditor in computing the actual amount accruing to the Judgment Creditor as the judgment sum. Thus, the accidental slip rule only applies to enable the Court to correct clerical mistakes in the judgment or Orders and not a variation or outright substitution of one amount for another which was never brought to the notice of the Court at the time the order was

made. Relying on **ELIAS V ECO BANK NIG PLC (2016) NGCA 62** and **BARRISTER ORIKER JEV & ORS V. IYORTONS & ORS (2015) NWLR N (PT 1483) 484**, counsel submitted that the Judgment Creditor has not disclosed any of the requirements in the supporting Affidavit as to bring this application within the exceptional circumstances in which this court can revisit its order nisi of 23<sup>rd</sup> September, 2020. Counsel further submitted that a closer look at the attached Certificate of Judgment known as Exhibit API, the aggregate sums in the Certificate of Judgment attached is not N9, 640, 000 (Nine Million, Six Hundred and Forty Thousand Nair) as determined by the judgment creditor. Counsel urged the court to hold that the instant application lacks merit and it lends credence to the Judgment Debtor's application to set aside the Order Nisi for misrepresentation. In conclusion counsel urged the Court to hold that it lacks jurisdiction to grant the application having become functus officio in the prayers sought. He relied on the following authorities amongst others;

1. **BERLIEST NIG LTD V ALH MUSTAPHA KACHALLA (1995) LPELR-775 (SC)**
2. **FBN PLC V. TSA INDUSTRIES LTD (2010) ALL FWLR (pt. 537) 633 @ 671.**
3. **AMA V. NWANKWO (2008) ALL FWLR (Pt 41 1) 879 @ 895,**
4. **EASTERN BREWERIES PLC V.S.I.N.U.E.N. (2000) 3 NWLR (PART 650) 67.**

The issue is whether this Court can vary its Order Nisi?

While Applicant is seeking that the order Nisi be varied in line with the Judgment of the lower Court, Counsel to the Judgment Debtor is of the opinion that the Court is functus officio subsequent to giving its Judgment and such Judgment cannot be varied except by the application of **Order 25 Rule 7 of the FCT High Court Rules 2018** which provides that;

“The Court may at any time correct clerical mistakes in Judgments or orders, or error arising from my accidental slip or omission or upon an application what an appeal may be filed”.

I quite agree with learned Counsel to the Judgment Debtor that the Court is indeed functus officio subsequent to delivering its Judgment as it would amount to sitting on appeal on its own Judgment/order save for the application of **Order 25 Rule 7 of FCT High Court Rules, 2018** to correct slips or clerical mistakes. The Judgment before this court is a judgment delivered by the senior district Court Wuse Zone 2 dated 4/07/2018. In enforcing the said Judgment, the Judgment Creditor has filed a Garnishee Nisi which this Court granted. The application before the Court is a variation of the order of Garnishee Nisi to come in line with the Judgment of the Lower Court. Hence application is not seeking to vary Judgment but to vary order Nisi.

The question that comes to fore is “whether having granted an order Nisi in execution of the Judgment sum, this Court can vary the order”?

As earlier stated, the Court is functus officio subsequent to delivering its Judgment or Order but it is worthy to add that such Judgment or Order whether final or interlocutory must be one which determines the rights of the parties. It is worthy to note also that the Judgment of the Lower Court is not what applicant is seeking to vary but the order Nisi granted by this Court in execution of the Judgment of the Lower Court. The Supreme Court has held in a lot of cases that the test to be applied for the purpose of determining whether a decision is final or an interlocutory one is to look at the nature of the order made and not the nature of the proceedings. If the order determines the rights of the parties and conclusion on their rights so as to prevent the adverse party against whom Judgment was given to further plead or adduce evidence against it before the trial Court in order to upstage it, such Judgment or order is a conclusive one. In other words, once the adverse party is stripped per rem judicata from revisiting the issue before the same Court or Court of co-ordinate jurisdiction, then the Court is functus officio See **A.I.B. VS. PACKOPINT NIG LTD (2003) LPELR-7187(CA) @ PG. 8-9.**

Contrary to submission of learned Counsel to the Judgment Debtor the Court granting an Order Nisi does not make the Court functus officio subsequent to pronouncing an Order Nisi. The very nature of an Order Nisi does not in any way determine the rights of the parties. Order Nisi is granted on an Exparte application, in other words the rules of Court does not provide that Judgment Debtor be put on notice before granting an order Nisi particularly because an order Nisi is not a conclusive order as to determine the rights of the parties as to sustain a plea of the doctrine of estoppel per rem judicata. In other words, an Order Nisi is not a final decision determining the rights of the parties, more so it is not capable of execution. Consequently, varying an order Nisi by the Court can even be done at any time before the granting of an order absolute. An order Nisi is simply to invite the Garnishees to show cause why such payment should not be made to the Judgment Creditor. See **OCEANIC BANK VS. OLADEPO & ANOR (2012) LPELR – 196770 (CA) per Mustapha JCA**. It is worthy to note that the Judgment Debtor is not a party to the granting of an Order Nisi hence the Judgment Debtor lacks the power to complain about the granting or varying of an order Nisi. It is only when the order Nisi has been served on the Judgment Debtor and the Garnishees inviting them to show cause why such order should not be made absolute that the Judgment Debtor has the power right to complain and show the Court by satisfactory evidence why the order should not be made absolute. Most of the issues raised by the Judgment Debtor in opposition to Motion to vary the order Nisi ought to be channeled to show cause to the Court why the order Nisi should not be made absolute.

Consequently, the application of Judgment Debtor to set aside the order Nisi is premature at this stage. The Judgment Debtor's application would only be properly before the Court once the Court grants the order for variation and same is served on the Judgment Debtor. As earlier stated in the earlier part of this ruling, the order Nisi is an order granted Exparte. Whether Judgment Debtor is served or not same can be varied. The Judgment Debtor and the Garnishees are only required by Law to file their reasons why the Court should not make the Order Nisi absolute.

This can only be done after the order Nisi has been served on the Judgment Debtor and Garnishees.

In conclusion, prayer for variation of Order Nisi made 14/10/2020 is granted as prayed. Order Nisi to be served on the garnishees to show cause and also on the Judgment Debtor as provided by **Section 83(2) of the Sheriffs and Civil Process Act**. Thereafter, the Judgment Debtor is at liberty to show cause why the order Nisi should not be made absolute.

**Parties:** Absent

**Appearances:** T. O. Omotayo appearing with Amarachi Ofoeze for the Judgment Creditor. M. A. Awuru for the Judgment Debtor. Olawale J. Adesina for the 5<sup>th</sup> Respondent.

**HON. JUSTICE M. OSHO-ADEBIYI**

**JUDGE**

**30<sup>TH</sup>MARCH, 2022**

