IN THE HIGH COURT OF THE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION
HOLDEN AT GWAGWALADA – ABUJA

ON WEDNESDAY 10TH MARCH, 2023

BEFORE HIS LORDSHIP: HON. JUSTICE ALIYU YUNUSA SHAFA

MOTION NO: FCT/HC/M/10059/2022

BETWEEN:

COL. ISAAC JEN…….…. JUDGEMENT/CREDITOR/APPLICANT

AND

1. **SHABRA GROUP OF COMPANIES LTD**
2. **ALH. IBRAHIM SALEH …… JUDGEMENT/DEBTORS**

AND

1. **ACCESS BANK PLC**
2. **ECOBANK PLC**
3. **FIDELITY BANK PLC**
4. **FISRT CITY MONUMENT BANK PLC**
5. **ZENITH BANK PLC**
6. **GUARANTY TRUST BANK PLC**
7. **FIRST BANK LTD**
8. **UNITED BANK FOR AFRICA PLC ……GARNISHEES**
9. **STERLING BANK PLC**
10. **POLARIS BANK LTD**
11. **UNION BANK PLC**
12. **ASO SAVINGS & LOAN BANK LTD**
13. **STANBIC IBTC BANK LTD**

RULING

This ruling on a motion notice with motion no: M/3998/2023 dated 30-1-2023 and filed the on same date.

The motion is brought pursuant to section 6(6)(a) of the Constitution of the Federal Republic of Nigeria 1999 Constitution (as amended)and under section 94 of the amended civil procedure Act 2004 CFN, order 2 rules 10 and 12 (A) of the Judgement enforcement rules.

The motion seeks for the following reliefs.

1.An order of court setting aside the order of this court made on the 24-1-2023 making the Order Nisi with respect to motion no: FCT/HC/10059/2023 absolute against the 12th garnishee applicant.

2. An order granting leave to the 12th Garnishee/applicant to defend and show cause with respect to the Garnishee proceedings initiated against it as contained in motion No/FCT/HC/M/10059/2022, and in line with the facts deposed to in the 12th Garnishee/Applicant's affidavit to show cause deposed on 25-11-2022 and as contained in the case file of this court.

3. for such other and further orders as this Hon. Court will deem to make under the circumstances of this case.

In support of the motion is an affidavit of 6 paragraphs deposed to by Gerald Uwunna Nwaneri and a written address in compliance with the rules of this court of 6 pages.

The Judgement dabbles on being served with the motion filed and a counter affidavit in response to motion on notice filed by the 12th Garnishee of 4 paragraph deposed to by one Deniss Ebong and alongside the Respondent written address in support of the counter affidavit in opposition to Applicant's motion on notice of 7 pages.

The Applicant or the 12th Garnishee in moving the said motion paper places reliance on all the paragraphs of the said affidavit and the written address where he adopted the said written address as its oral submission. In the said written address, a sole issue was distilled for determination to wit:

> **"whether taking into consideration the peculiar facts and circumstance of this application, the court procession both the inherent and equitable Jurisdiction to set aside it's order made on the 24-1-2023 making absolute it's order Nisi against the Applicant.**

While the 12th Garnishee also adopted it's written address and in it formulated a sole issue for determination to wit:

> **Whether the court has the vires to set aside the order absolute made against the Applicant same being Final order of a trial court in a garnishee proceeding?**

Further, the judgement/creditor Respondent filed a further affidavit. In support of the Application to set aside the order absolute made on the 24-1-2023 deposed to by one Gerald Umunna Nwanere of 8 paragraph and a reply on point of law of the Applicant of 8 paragraph.

Before I proceed to the merit of the Application I shall highlight the position of the law.

Garnishee proceedings is one of the means of realizing a judgment debt. It is a special procedure involved to compel a third party (for instance a bank) who is in possession of the asset of the judgement debtor to forfeit the said asset to the judgement creditor to the tone of the debt in question. It has always been a tug of war between judgement creditor and third party Garnishee. The judgement creditor initially gets an order Nisi which compels the third party to show cause why the order should not be made absolute.

The law has always been that where a court has finally decided a matter before it effectually such a court cannot review/set aside same judgement.

Now to the main application. It is the affidavit of the 12th Garnishee which I will reproduce here under as follow:

Paragraph 4 of the affidavit Reads:

> **That on the said 24-1-2023 Chidozie Frankling Akwari a Junior Counsel in our law firm and who was called to the bar last December was instructed to attend court in order to serve the judgement creditor counsel with a copy of the Application affidavit and at the same time show cause why the order Nisi with not be made absolute against the 12th Garnishee.**

Paragraph 5

> **That I was informed by the Chidozie Franklin Awari in our office at the aforesaid address on the 24-10-2023 by 4:30 pm and a verily believed him as true that**

a. **He is not familiar with the landmarks in Gwagwalada so it was difficult for him to locate the court premises as he just settled in Abuja this year.**
b. **Although he left his house in good time in order to have ample time to locate the court but he could not do so.**

c. **At the time he was about to locate the court, the garnishee proceedinghas been heard and further enquiring made by him established that the order Nisi was made absolute against the applicant.**

On this he submitted that, this court should use invite, the inherent Jurisdiction and referred the court to the case of **Connelly V DPO (19643) Act 1254, where Lord Devlin said at Page 1347**

> **"--- my Lord, in my opinion, the Judges have in their inherent jurisdiction, both in civil and in Criminal matters, power (subject of course, to any statutory rules) to make and enforce rules of practice in order to ensure that the courts processes is used fairly and conveniently by both sides---. A controlling power of this character is well established in the civil Law.**

He further submits that one of the grounds, in which the courts can exercise it's inherent powers and upon which an order of court can be set aside and matter re-listed for hearing is where the order is made in default of appearance of one of the parties on this he referred the court to the case of **SALAWU Oke & ors V Musilim Aiyedun & Anor (1986) 2 NWLR 48 page 562.** Where **Anlagolu JSC** said thus:

> **"these rules of court have been carefully drafted to give power to a judge to set aside it's own judgement where circumstances preventing the party in default as explained to it, if uncontradicted and undiscredited would make the court appear in breach to the first limb of the rules of natural justice audi-alteram partem"**

Dealing with an application to set aside a judgment obtained in default of appearance and relist the case for hearing on the merit are:

1. **The reason of the applicant's failure to appear before the court when this case was hard.**

2. **Whether there had been undue delay in making application so as to prejudice the other party.**

3. **Whether the other party would be prejudiced or embarrassed by an order for a new trial so as to render it inequitable to re-open the case and,**

4. **Whether the applicant's case is manifested in supportable.**

On this he further submits that, the applicant has deposed to the fact that though it was served with the order nisi and was able to file its affidavit to show cause and deposited the court's copy with the Registrar of this court long before the garnishee proceedings were due for hearing but because of the inability of its counsel to appear at the hearing the order was made absolute against it, it has also deposed to the fact that its counsel was unable to appear for the hearing because of his poor knowledge of the location of the courts processes.

That it naturally follows that in order to avert a situation where an innocent party suffers in a matter of which he had no blame of fault the court has always made it as practice that is founded or common sense and the zeal to do substantial justice to grant an adjournment to enable that party put up its defence where the court will consider in its merit and where found meritorious will proceed to exonerate the party from the claims made against it. It is on this ground that the applicant is seeking leave of this court to permit it to approach it to show cause why the order nisi will not be made absolute against it, on the basis of the facts contained in its affidavit of the 25-11-2022.

He also submitted that the extension of judgement against a garnishee is reflected by statutory provisions as provided in section 86 of the S C P A 2004 CFN but it is further submitted that this court has held that in interpreting those statutory provisions it has to employ the doctrine of equity it can be said, that the court is bound to consider the conduct of the parties and the circumstance of each case in resolving whether or not to grant or refuse any application for setting aside its order placed before it. And in the case of Anwatika V Administrator General of Anambra State Public Trustee (1996) 7NWLR part 460page 315 at page 334-335 Tobi JCA said thus:

> **"Although equity, in most cases follows the law, there are known instances where it parts way with the law. One such instances is when the law in its rigid context is capable of doing Justice. Equity then comes with its ameliorating sense of fairness, candour and justice to**

mitigate the hardship and rigidity of the law. While it is conceded that equity generally lacks the legal capacity to soften the clear provisions of a statute, the position becomes different if the statute itself has inbuilt equitable provision."

In response, the applicant/judgement creditor's lawyer submitted that, this court granted the application of the Judgement creditor against 13 Banks and caused all the garnishees to be served. That all the garnishees except the applicant who was the 12th garnishee failed to show cause on the return date which was 28th day of November, 2022 and on 02-12-2022, the counsel to the judgement creditor moved the court to make the order absolute when again they were not in court to show cause why the order Nisi should not be made absolute.

This in response on point of law, the Applicant (12th Garnishee stated that the applicant was not heard on its right and obligation because it was unaware of that proceeding as a result of none service of hearing notice on it of the 2-12-2022 proceedings. That on the 2:12:2022 there were no papers presented by the applicant before the court in order to determine whether or not, it has shown sufficient cause why the order Nisi will not be made absolute against it.

He went further to state that section 83(2) of the SCPA provides that

"at least Fourteen days before the day of hearing, 4 copies of the order nisi shall be served upon the garnishee and on the judgement debtor"

That in view of the above provisions of S C P A, it appears that the condition precedent that a court must satisfy before it can assume jurisdiction over a garnishee or the judgment debtor is that at least a period of 14 days from the date of service of the order nisi on either the garnishee or the judgement debtor must lapse. And that in the instance case, the order was served on it on the 17-11-2022 while the hearing notice commanded it to appear before the court on the 28/11/2022, further that when this court sit on the 28-11-2023 the 14 days' window period granted the applicant is yet to lapse, so the applicant is not under any compulsion or statutory obligation to appear before this court on that day in order to show cause. That the court further adjourned to the 2-12-2022 for the garnishee to show cause. And that it was on that 2-12-2022 that this court proceeded to make the order absolute on the applicant.

From the forgoing what this court can deduce from the submission which I felt is germane are two strong reasons:

1. **Service of hearing notice**

2. **Time frame between the order nisi, and when the order absolute was granted by this court.**

Assuming but not conceding, that the instances maintained above are absent it goes therefore that the application of the applicant has merit because service of court process or hearing notice is very crucial it is trite that service of court process is a pre-condition to the jurisdiction of the court. Failure to serve a defendant hearing notice is a fundamental vice. Again Non-compliance of order 83(2) of the S C P A renders the proceedings void the defendant who complains or the applicant who complains of such non-compliance is entitled ex-debito Justitia to have same set aside, steps in the matter which will amount to a waiver of the irregularity complained of. See PWTH AG Vs Ceddi Corp Ltd (2012) garnishee still proceeding to file affidavit to show cause why the order nisi made on the 2-11-2022 will not be made absolute against the 12th garnishee the said affidavit dated the 25-Novembem, 2022 and filed on the same date.

In the said affidavit to show cause by the 12th garnishee he stated in paragraph (d) thus:

> **"Immediately the aforesaid order nisi made by this court was served on the 12 garnishee Bank, he conducted a search on the 12th garnishee Bank customer information system but found that the judgement debtor did not maintain any account with the 12th garnishee Bank neither do they have any assets or funds with the 12th Garnishee Bank.**

It is trite law that the principle of Nemodat good no habit applies in this instant case meaning a person can only convey to another that which he has "See Elewa V Gossanti (Nig) Plc) 2017 2 NWLR PT. 1549 page 233.

From the above circumstances as mention above, hold that this court has the inherent power to set aside the order absolute made against the 12thGarnishee/Applicant as the order was made without compliance with order83(2) of the S C P A and none service of hearing notice on the 12th Garnishee.

In view of the forgoing, the order absolute against the 12th Garnishee is hereby set aside and based on the affidavit to show cause filed by the 12th Garnishee as stated in this ruling, the 12th Garnishee is hereby discharged from the proceedings having shown the affidavit to show cause.

This is my ruling.

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HON. JUSTICE A. Y. SHAFA

APPEARANCE:

1. C. F. Akwari for The 12th Garnishee Aso Saving.
2. Efe G. Daniel for The Respondent.