

IN THE HIGH COURT OF JUSTICE FEDERAL CAPITAL TERRITORY

IN THE ABUJA JUDICIAL DIVISION (APPELLATE DIVISION)

HOLDEN AT MAITAMA – ABUJA

BEFORE THEIR LORDSHIP: HON. JUSTICE Y. HALILU – PRESIDING JUDGE,

HON. JUSTICE ELEOJO ENENCHE – HON. JUDGE

THIS 28TH DAY OF FEBRUARY, 2024

SUIT NO. CV/8001/2018

BETWEEN:

FIRST BANK OF NIGERIA LIMITED ----- APPELLANT

AND

MRS. GRACE ADETOLA ----- RESPONDENT

JUDGEMENT

The Defendant in the Court below, being dissatisfied with the decision of the Senior District Court sitting at Dutse Coram, *Honorable Ahmed Yusuf Ubangari*, delivered on the 16th day of July 2021, has now appealed against that decision. The appeal is premised on three grounds, namely;

GROUND ONE

The Honourable trial Judge of the Senior District court erred in law when, after making absolute the sum of ₦1,894.51 stated in the Appellant's affidavit showing cause, proceeded to award a cost of ₦200,000 against the Appellant and in favour of the Respondent as cost of the garnishee proceedings.

GROUND TWO

The trial judge erred in law when he considered and granted the respondent's application titled "*Motion On Notice For Garnishee Order Absolute*", by which he directed the appellant to pay the respondent the sum of ₦200,000 being the cost of the garnishee proceeding despite the Appellant filling and serving affidavit to show cause upon receipt of the garnishee order Nisi.

GROUND THREE

The award of the sum of ₦200,000 as cost of garnishee proceedings in favour of the Respondent despite the appellant filling and serving an affidavit to show cause in which it declared the sum of ₦ 1,894.51 as standing to the credit of the judgment debtor and the failure/refusal of the trial court to vary the said order upon application of the appellant is arbitrary, unwarranted and has occasioned a miscarriage of justice.

GROUND FOUR

The ruling of the court below is against the law and the weight of evidence.

The particulars of errors accompanied all the grounds in urging us to allow the appeal and set aside the court's ruling below.

The Appellant's brief of argument is dated 25th April 2022, in which a sole issue was submitted for determination. The issue was "*whether the trial court was right in awarding cost against the appellant upon the respondent's "motion on notice for order absolute" when the appellant had already shown cause and served same on the court and respondent.*" Suffice to mention that the Appellant also filed a reply to the respondent's brief dated 22/11/23.

On the part of the Respondent and before the court for consideration is the Respondent's brief dated 6th November 2023, which equally raised a sole issue for determination, i.e. "whether the trial court is empowered by law to grant cost of garnishee in any garnishee proceedings?"

Looking at both briefs, it is not difficult to decipher that the crux of this appeal is whether the learned trial district court judge was right when he granted cost against the appellant even though they had filed an affidavit to show cause detailing the amount standing to the credit of the judgement debtor. On this score, we shall adopt as ours the sole issue formulated by the Appellant in its brief.

In determining this issue, firstly, the cost awarded by the learned trial judge followed a "*motion on notice for order absolute*". This process, it has been argued, is not one known to the Sheriffs and Civil Process Act (SCPA) going by the provision of Section 83(1) thereof and also Order 46 Rule 1(1) of the rules of this court. Counsel further relied on Section 83(2) and the case of **GUARANTY TRUST BANK V INNOSON NIGERIA LIMITED (2018) ALL FWLR (PT. 961) PG. 1505**. Counsel opined that the Appellant had duly complied with the provisions of the law when it showed course via its affidavit on 16th October 2020. However, it would seem that on the day of the hearing, counsel was not available to adopt the said affidavit. In any case, that is a different kettle of fish to which we shall return anon.

In the meantime, in counteracting this argument, it was argued for the Respondent that the contention that the motion is one unknown to law is totally misplaced as the motion on notice filed by the judgement creditor was a follow-up to the Order Nisi seeking an absolute order.

We will cut to the chase and go straight to the meat of this issue and make our conclusion up front by stating that the application christened “*Motion on notice for order absolute* “ is a strange application and one unknown and unanticipated by the **SCPA**. We take this from the provision of Section 83(1) SCPA. The section mandates that the court may, upon the exparte application of any person who is entitled to the benefit of a judgement for the recovery or payment of money, either before or after any oral examination of the debtor liable under such judgment and upon affidavit by the applicant or his legal practitioner that judgment has been recovered and that it is still unsatisfied and to what amount and that any other person is indebted to such debtor and is within the State, order that debts owing from such third person, hereinafter called the garnishee, to such debtor shall be attached to satisfy the judgment or order, together with the costs of the garnishee proceedings and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor or so much thereof as may be sufficient to satisfy the judgment or order together with costs aforesaid.

From the above, it is clear that while the application leading to an Order Nisi is made ex-parte, in practice and also in obedience to Section 83 (2) SCPA, the Order Nisi with a return date of not less than 14 days from the day of service of the order Nisi is served on the Garnishee at which appearance the affidavit to show cause will be considered. We do not know of any procedure that permits filing a fresh motion on notice, as has been done in this case. That motion is unknown to law and superfluous, and it should have been discountenanced by the court, which had a duty to simply consider the affidavit to show cause on the return date, and we so hold.

As it appears, the Appellant filed an affidavit to show cause. This fact is not in contention. It is also not in contention that on the day fixed for the hearing, the Appellant was not in court, and as such, the court failed to countenance the earlier affidavit filed to show cause. Learned counsel for the Respondent on this score argued that affidavit evidence is akin to a Statement of Claim or defence when a case is heard on affidavits. Thus, where a party that was supposed to appear before the court to rely on or adopt the said affidavit is absent, such an affidavit cannot form part of the evidence before the court. Counsel likened an affidavit to a witness statement on oath, which must be adopted before the court can rely on it. He relied on the case of **MR. IRE MATHWE OWURU & ANOR. V. HON. AGI MICHEAL ADIGWU & ANOR (2017) LPELR** to so argue.

We must say that learned counsel has misconstrued the law when he equated a witness statement on oath with an affidavit. Without wasting precious judicial time, we posit that a written statement on oath is not an affidavit, and the same provisions do not govern them. Furthermore, the difference between the two has been made clear; see **ETENE V. NYONG & ORS (2011) LPELR-9261(CA)**, where the Court held that a witness statement on oath differs from an affidavit. An affidavit is a statement that the maker, as a deponent, swears to be true to the best of his knowledge. It is a Court process in writing, deposing to facts within the deponent's knowledge. It is documentary evidence which the Court can admit in the absence of any unchallenged evidence. **AKPOKINLOYE V. AGES (2004) 10 NWLR (PT. 881) 394**. Conversely, a witness statement on oath is not evidence. Before a witness statement would be taken as evidence the witness would be sworn in, in Court. He will state his name, trade or profession and give his address. He adopts his written statement and is cross-examined before it can be admitted in evidence. It is, therefore, wrong for counsel to equate a

witness statement with an affidavit. See generally, **MR. TOMIDE AKEREDOLU v. THE REGISTERED TRUSTEES OF THE GOSPEL FAITH MISSION INTERNATIONAL & ORS (2022) LPELR-57840(CA).**

In essence, a written statement on oath will only be evidence to be used by the Court to determine the Plaintiff's Claim if it has been adopted by the person who deposed to it as his testimony during the trial. An affidavit, on the other hand, is the evidence of the witness made in writing. Thus, whether or not the deponent appears in Court, such depositions can be evaluated by the Court as evidence. See **SPLINSTERS (NIG.) LTD & ANOR V. OASIS FINANCE LTD (2013) 18 NWLR (PT.1385) P.188 AT 227 PER IZOBA, JCA; AGAGU V. MIMIKO & ORS (2009) 7 NWLR (PT.1140) P.34; ORAEKWE V. CHUKWUKA (2012) NWLR (PT.1280) P.87 AT 201; and MR MICHEAL ONWUFUJU v. CHIEF SHERRIF FRANCIS OROHWEDOR (2020) LPELR-50767(CA)** . We are thus in good legal standing to hold that the learned trial district court judge had a duty to consider the affidavit to show cause, which was before him whether or not the same was adopted as it already formed evidence before the court and where it was unchallenged act upon it as he deems appropriate. It was thus wrong for his honour to have failed to consider the affidavit, especially as it divulged the amount that was standing to the credit to the Judgment Debtor, which at that time stood at a paltry ₦1,894:51k obviously not enough to satisfy the judgment debt and we so hold.

Taking from above, the question arises when is there said to be a dispute of liability by a garnishee and which requires further enquiry under Section 87 of the Sheriffs and Civil Process Act? Is it once a garnishee appears to a garnishee order nisi and files an affidavit simpliciter to show cause? Or is it where a garnishee files an affidavit to show cause dovetailing on specifics, and the facts deposed therein are countered or contested by the judgment creditor in a further

affidavit? Or is it where a garnishee files an affidavit to show cause dovetailing of specifics, whether or not the judgment debtor counters those facts in a further affidavit?

The Court of Appeal in a trilogy of cases, **POLARIS BANK LIMITED VS GUMAU (2019) LPELR-47066(CA)**, **STERLING BANK PLC VS GUMAU (2019) LPELR-47067(CA)** and **FIDELITY BANK PLC VS GUMAU (2019) LPELR-47068(CA)**, held that the position of case law puts forward three different scenarios. Firstly, where a judgment creditor gives specific and clear facts in an affidavit showing that monies of a judgment debtor are in the hands of a garnishee, and the affidavit to show cause of the garnishee denying liability does not condescend on material particulars and does not conflict with the facts deposed by the judgment creditor, there is no dispute of liability warranting further enquiry under Section 87 of the Sheriffs and Civil Process Act, and the Court can go ahead and make an order of garnishee absolute - **SKYE BANK PLC VS COLOMBARA & ANOR (2014) LPELR 22641(CA)**, **GOVERNOR OF IMO STATE VS OGOH (2015) LPELR 25949(CA)**, **ACCESS BANK PLC VS ADEWUSI (2017) LPELR 43495(CA)**, **FIRST BANK OF NIGERIA PLC VS OKON (2017) LPELR 43530(CA)**, **HERITAGE BANK LTD VS INTERLAGOS OIL LTD (2018) LPELR 44801(CA)**, and **FIRST BANK OF NIGERIA PLC VS YEGWA (2018) LPELR 45997(CA)**. In other words, the garnishee must make out a prima facie case in favour of an order for an issue to be tried - **CENTRAL BANK OF NIGERIA VS SUN & PADDY INTERNATIONAL GROUP (NIG) LTD (2018) LPELR 44766(CA)**. Secondly, that where a judgment creditor gives specific and clear facts in an affidavit showing that monies of a judgment debtor are in the hands of a garnishee, and the affidavit to show cause of the garnishee denying liability condescends on particulars and conflict with the facts deposed by the judgment

creditor, there is a dispute of liability warranting the use of Section 87 of the Sheriffs and Civil Process Act - *CENTRAL BANK OF NIGERIA VS HYDRO AIR PROPERTY LTD (2014) 16 NWLR (PT 1434) 482*, *MAINSTREET BANK LTD VS UNITED BANK FOR AFRICA PLC (2014) LPELR 24118(CA)*, *ECO BANK (NIG) PLC VS MBANEFO & BROS LTD (2014) LPELR 41106(CA)*, and *Total Upstream Nigeria Ltd Vs A.I.C. Limited (2015) LPELR 25388(CA)*. The third scenario is where a garnishee order nisi is granted on the basis of a general statement of a judgment creditor that monies of a judgment debtor are in the hands of a garnishee, and the affidavit to show cause of the garnishee denying liability condescends on particulars showing that it has no such funds, a dispute as to liability warranting the use of Section 87 of the Sheriffs and Civil Process Act will only arise where the judgment creditor deposes to a further affidavit contesting the assertions of the garnishee, otherwise the garnishee would be discharged on the basis of its deposition - *ZENITH BANK PLC VS KANO (2016) LPELR 40335(CA)*, *ECO BANK NIGERIA LIMITED VS UDOFIA (2018) LPELR 45164(CA)*, and *ALL WORKS COMMERCIAL COMPANY LTD VS CENTRAL BANK OF NIGERIA (2018) LPELR 45991(CA)*. This is in furtherance of the principle that where the depositions in the original affidavit do not cover specific facts in a response affidavit, the party must file a further affidavit to counter those specific facts; otherwise, they will be deemed admitted - *BADEJO VS FEDERAL MINISTRY OF EDUCATION (1996) 8 NWLR (PT 464) 15*, *DANA AIRLINES LTD VS YUSUF (2017) LPELR 43051(CA)*, *YANDY VS ALHAJI UMAR NA ALHAJI LAWAN & SONS LTD (2018) LPELR 45634(CA)*, and *AKITI VS OYEKUNLE (2018) LPELR 43721(SC)*.

All said, and in line with the third scenario painted above, the Appellant filed its affidavit to show cause and declared how much of the Judgement Debtor's

money it had. Strangely, rather than file a further affidavit if it was determined to challenge the facts conveyed in the affidavit to show cause, the Respondent refused to do so, and the court, in ruling upon yet a stranger application, made an order absolute upon an unchallenged affidavit to show cause. This procedure adopted we hold wrong in all ramifications, and the determination of the court below ought to be set aside.

Finally, we are not left in doubt that by the provision of the SCPA, in addition to the judgment debt or order, monies may also be attached to satisfy the costs of the garnishee proceedings. Still, these must be monies standing to the credit of the Judgment Debtor and not personal funds of the garnishee unless, of course, in instances where a garnishee is shifty or evasive. In this case, the affidavit to show cause was clear, precise and spoke to specifics. What the trial court has done, albeit wrongly, is to put the burden of paying the cost upon the garnishee, who had already filed an affidavit to show that the money in its credit to the advantage of the Judgment Debtor was N1,894:51k. From where was it, therefore, expected to pay the ₦200,000 awarded as cost? This amounts to putting an unfair burden upon the garnishee, and we so hold.

Having so determined, all that remains is for us to pronounce that this appeal is meritorious. Accordingly, we order that the ruling of the court below Coram Ahmed Yusuf Ubangari, delivered on 16th July 2021, be and is hereby set aside.

HON. JUSTICE Y. HALILU
PRESIDING JUDGE

HON. JUSTICE E. ENENCHE
HON. JUDGE