**ACCESS BANK PLC**

**V.**

**ADEWUSI**

COURT OF APPEAL (LAGOS DIVISION)

FRIDAY, 24 FEBRUARY 2017

CA/L/120A /2013

**LEX (2017) - CA/L/120A /2013**

OTHER CITATIONS

2PLR/2017/12 (CA)

**BEFORE THEIR LORDSHIPS:**

MOHAMMAD LAWAL GARBA JCA (Presided)

TIJJANI ABUBAKAR JCA (Read the Lead Judgment)

ABIMBOLA O. OBASEKI-ADEJUMO JCA

**BETWEEN**

ACCESS BANK PLC – Appellant

AND

C. O. ADEWUSI AND 65 OTHERS – Respondent

**ORIGINATING COURT**

HIGH COURT OF LAGOS STATE, LAGOS DIVISION (G. M. Onyeabo J., Presiding)

**REPRESENTATION/LAWYERS**

A.A. ADEGBOMIRE SAN, [with him, O. IYAYI and O. TAIWO] - for the Appellant.

FELIX OGUNMADE [with him, YEMISI ONAOPEMIPO, JOHNSON AMAECHI and AREWA LAIDE] - for the Respondents.

**ISSUES FROM THE CAUSE(S) OF ACTION**

BANKING AND FINANCE LAW – BANKING OPERATIONS: Garnishee-Garnishor proceeding - Where bank is required to file an affidavit to show cause – Where particulars of bank account (including bank account numbers) against which order was made had changed due to government policy/regulatory requirements – Duty of bank to lead evidence showing the relationship between the new details and the former details against which the court order proceeded – Attempt by bank/garnishee to evade an order of court to file materials disclosing valid and substantial reasons why the order nisi must not be made absolute – Attitude of court thereto

DEBTOR-CREDITOR LAW – GARNISHEE-GARNISHOR PROCEEDINGS:- Ex-parte application for garnishee order nisi against a bank as garnishee in respect of the judgment debt of one of its customers - Garnishee Order Nisi directing bank/garnishee to show cause why the order nisi should not be made absolute in respect of any sum held in the account of the judgment debtors/respondents – Duty of bank/garnishee thereto

DEBTOR-CREDITOR LAW – GARNISHEE-GARNISHOR PROCEEDINGS:- Garnishee Order Nisi directing bank/garnishee to show cause why the order nisi should not be made absolute - Affidavit of bank stating that none of the judgment debtors listed in the garnishee order nisi had a banking relationship with the bank/garnishee – Burden of proof relating thereto – On whom lies – How proved – Effect of failure thereto

DEBTOR-CREDITOR LAW – GARNISHEE-GARNISHOR PROCEEDINGS:- Garnishee Order Nisi directing bank/garnishee to show cause why the order nisi should not be made absolute - Section 83 of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004 - Duty of bank thereto – Where treated with mockery – Attitude of court thereto – Proper order for court to make

DEBTOR-CREDITOR LAW – GARNISHEE-GARNISHOR PROCEEDINGS:- Onus of proof placed on a garnishee pursuant to a Garnishee Order Nisi – When would be deemed satisfied – Contradictory claims in affidavit filed by bank/garnishee – Claim that the account(s) against which the order proceeded were frozen by another court – Where set against another claim that the account no longer exist or was in debit – Proper inference for court to reach

HUMAN RIGHT – FAIR HEARING:- Meaning and connotations of - Applicability of to litigants - Contention that right to fair hearing had been violated in a judicial proceeding – Where a party has been given the opportunity to make his case but fails to do so – Attitude of court to complaints on ground of denial of fair hearing

**PRACTICE AND PROCEDURE ISSUES**

EVIDENCE - AFFIDAVIT BEFORE THE COURT:- Where contains conflicting depositions – Duty of court thereto

JUDGMENT AND ORDER - ENFORCEMENT OF JUDGMENT – GARNISHEE-GARNISHOR PROCEEDINGS:- Garnishee – When served with a garnishee Order Nisi – Duty to discharge duties consequent thereupon – Effect of failure thereto

**CASE SUMMARY**

The respondents filed an ex-parte application for Garnishee Order Nisi against the appellant and another garnishee bank. The court, upon hearing the application, granted the order against the appellant bank, directing it to show cause why the order nisi should not be made absolute in respect of any sum held in the account of the judgment debtors.

In compliance with the order of the lower court, the appellant filed an affidavit to show cause dated 14 May 2012, wherein the appellant stated that although the judgment debtors previously maintained two bank accounts with the appellant, but the said bank accounts were closed in 2009. It also proceeded to file extracts of accounts with different numbers for the years 2011-2012, showing figures in debit without establishing the nexus between the accounts.

The trial court made the garnishee order absolute against the appellant. Dissatisfied, the appellant appealed to the Court of Appeal.

**DECISION(S) APPEALED AGAINST**

The trial Court entered judgment in favour of the Claimant/Respondent, by making the garnishee order nisi it earlier granted absolute against the Defendant/Appellant, hence the appeal by the Defendant/Appellant.

**ISSUE(S) FOR DETERMINATION ON APPEAL**

*BY APPELLANT:*

“Whether having regard to the provisions of section 83 of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004, and section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the lower court was right to have entered a garnishee order absolute against the appellant?”

*BY RESPONDENTS*

“1. Whether in view of the order nisi, the appellant adduced sufficient evidence in support of its claims such that the lower court was wrong to hold that it failed to show cause why the order nisi should not be made absolute.

2. Whether the appellant who deliberately refused to produce material evidence can complain that it was not accorded fair hearing. For the purpose of determining this appeal, the sole issue nominated by the appellant shall constitute the footing of discourse in this appeal because issues for determination are by their nature designed to narrow down the relevant points in issue in the determination of an appeal, the sole issue for determination crafted by the appellant is therefore adopted as the issue to resolve in this appeal. The appellant’s sole issue in my view encompasses the two issues nominated by the respondents, I will however run through the submissions of counsel on all the issues discussed in the appeal.”

*AS ADOPTED BY COURT*

[The Court adopted the Issues presented by the Appellants]

DECISION OF THE COURT OF APPEAL

1. There was a garnishee order nisi dated made against the garnishee/bank/appellant wherein the lower court directed the appellant bank to show cause why the order nisi should not be made absolute in respect of any sum held in the account of the judgment debtors/respondents. In compliance with the order, the appellant filed an affidavit wherein the appellant claimed that none of the judgment debtors listed in the garnishee order nisi had a banking relationship with the appellant as at the time the order was made. However, the affidavit contained insufficient particulars proving the claim.

2. Having regard to the provisions of section 83 of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004, and section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the lower court was right to have entered a garnishee order absolute against the appellant as the contents of the affidavit filed by the bank/garnishee/appellant constituted a complete mockery of what a statement of account should contain. There was nothing on the face of the documents to show the history of the transactions conducted as per the respective accounts. Instead of the account numbers indicated in the court order, another set of account numbers were referred to in the affidavit without any attempt made to show the relationship, if any, between the two sets.

3. The appellant/Garnishee carefully evaded filing materials disclosing valid and substantial reasons why the order nisi must not be made absolute. The appellant failed to furnish comprehensive statement of account as required by the order of the lower court. The appellant has a duty to ensure that the orders of the lower court are carried out effectively and completely to conclusion. The garnishee bank must supply the details of the accounts listed and nothing else. The onus placed on a garnishee would only be discharged where it successfully establishes that the account referred to in the decree nisi does not exist in its system or if it exists, it is heavily in debt and not in credit, or that the number stated on the order nisi had since changed to another version.

**MAIN JUDGMENT**

ABUBAKAR JCA (Delivering the Lead Judgment):

This is an appeal against the ruling of the Lagos Division of the High Court of Lagos State, delivered on 13 November 2012 by G. M. Onyeabo J. in suit No: LD/1230/2010.

The relevant facts leading to this appeal are that the respondents filed an ex-parte application for garnishee order nisi against the appellant and another garnishee bank. The said application is contained at pages 1-13 of the record of appeal. The court upon hearing the application, the lower court made the garnishee order nisi dated 30 April 2012 contained at pages 70 - 71 of the record of appeal, wherein the lower court made an order directing the appellant bank to show cause why the order nisi should not be made absolute in respect of any sum held in the account of the judgment debtors/respondents. In compliance with the order of the lower court, the appellant filed an affidavit showing cause dated 14 May 2012 as contained at pages 14 – 17 of the record of appeal, wherein the appellant stated that none of the judgment debtors listed in the garnishee order nisi had a banking relationship with the appellant as at the time the order was made, although the judgment-debtors previously maintained two bank accounts with the appellant, but the said bank accounts were closed in the year 2009.

This disclosure apparently irritated the respondents who filed a counter-affidavit to the appellant’s affidavit to show cause contesting the facts deposed to therein, the appellant in response to the counter-affidavit then filed a reply affidavit.

These are the materials upon which the lower court acted and on 13 November 2012, the lower court made the garnishee order absolute against the appellant upon the application of the counsel to the respondent upon being satisfied that it was proper to make the order absolute. This order absolute nettled the appellant bank who made for this court, armed with the notice of appeal dated 23 January 2013 containing two grounds of appeal, the notice of appeal is at pages 79-84 of the record of appeal, the grounds of appeal less their respective particulars are reproduced as follows:

1. The learned judge of the High Court of Lagos State (lower court), fell gravely into an error of law when she proceeded to enter an order absolute against the appellant on 13 November 2012, stating as follows, to wit:

“If it is correct that an account was in zero balance, it ought to be so demonstrated just as the instant exhibit shows a zero balance. These are matters of documentary evidence which should not admit oral evidence to vary or explain as it were. In the event the garnishee banks have failed to show cause why the order nisi should not be made absolute. Consequently, the order nisi earlier granted is hereby made absolute against both garnishee banks.”

2. The learned trial judge fell gravely into an error of law when it did on 13 November 2012, enter an order absolute against the appellant herein without considering the contents of the appellant’s affidavit to show cause dated 14 November 2012, thereby infringing upon the appellant’s constitutional right to fair hearing as enshrined and guaranteed by the provisions of section 36 of the Constitution of the Federal Republic of Nigeria, 1999.

The appellant’s brief of argument was filed on 26 April 2016 by learned senior counsel, Adeniyi Adegbomire SAN. It was deemed as properly filed and served on the same date. The appellant also filed a reply brief of argument on 29 September 2016.

The respondent on the other hand filed their brief of argument through learned counsel Felix Ogunmade, on 4 August 2016. It was deemed as properly filed and served on 1 November 2016.

The appellant distilled and submitted a sole issue for determination on its brief of argument. The issue is reproduced as follows:

“Whether having regard to the provisions of section 83 of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004, and section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the lower court was right to have entered a garnishee order absolute against the appellant?”

The respondents on the other hand nominated two issues for determination, to wit:

1. Whether in view of the order nisi, the appellant adduced sufficient evidence in support of its claims such that the lower court was wrong to hold that it failed to show cause why the order nisi should not be made absolute.

2. Whether the appellant who deliberately refused to produce material evidence can complain that it was not accorded fair hearing. For the purpose of determining this appeal, the sole issue nominated by the appellant shall constitute the footing of discourse in this appeal because issues for determination are by their nature designed to narrow down the relevant points in issue in the determination of an appeal, the sole issue for determination crafted by the appellant is therefore adopted as the issue to resolve in this appeal. The appellant’s sole issue in my view encompasses the two issues nominated by the respondents, I will however run through the submissions of counsel on all the issues discussed in the appeal.

Submissions of Counsel:

Learned counsel for the appellant contended that garnishee proceedings are governed by the provisions of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004, and section 36 of the Constitution of the Federal Republic of Nigeria, 1999, and that the lower court failed to abide by the dictates of these provisions. Learned counsel for the appellant referred to sections 83 and 86 of the Sheriffs and Civil Process Act and the decision in Standard Trust Bank Ltd v. Contract Resources (Nig.) Ltd (2001) FWLR (Pt. 72) 1922, (2001) 6 NWLR (Pt. 708) 115 at page 123 to submit that the appellant in this appeal can only be liable for the payment of the judgment debt standing against the judgment-debtors if only the appellant is indebted to the judgment-debtors as at the date of the making the garnishee order absolute.

Learned counsel argued further that the liability of a judgment-debtor in a garnishee proceedings is only to the extent of sums held by the garnishee in favour of the judgment-debtor and that it is not the intention of the Sheriffs and Civil Process Act that, an order absolute shall be made against a garnishee, where the garnishee is able to show in his affidavit to show cause, that he does not have in his custody sums belonging to/standing to the credit of the judgment-debtor. Learned senior counsel for the appellant further submitted that the lower court lacked the powers/jurisdiction to proceed to make a garnishee order absolute against the appellant in the absence of proof of a banking relationship between the appellant and the respondents or that the respondents have sums standing to their credit in the hands of the appellant as at the date of making the garnishee order absolute. He referred to C.B.N. v. Auto Import and Export (2013) 2 NWLR (Pt. 1337) 80 and further submitted that the garnishee order absolute made by the lower court was made on a faulty premise and amounts to a grave error of law on the part of the lower court.

Learned senior counsel for the appellant further submitted that the respondents’ counter-affidavit dated 5 December 2012 merely stated that the facts contained in the appellant’s affidavit to show cause were false without substantiating same. He contended that it would satisfy the provision of section 83 and 86 of the Sheriffs and Civil Process Act for the appellant to state in its affidavit to show cause that the judgment-debtors holds no account with it. Learned senior counsel for the appellant further submitted that the burden on the appellant before the lower court was to state on oath, whether or not the appellant is indebted to the judgment-debtor and if so, to what extent?

Learned senior counsel relied on Attorney-General of Bayelsa State v. Attorney-General of Rivers State (2006) 18 NWLR (Pt. 1012) 596 at 625, (2007) All FWLR (Pt. 349) 1012; Egharevba v. Osagie (2009) 18 NWLR (Pt. 1173) 299 at 315, (2010) All FWLR (Pt. 513) 1255 and section 81 of the Evidence Act, 2011 to submit that the burden to establish the existence or non-existence of a fact is on the party who asserts the existence of the facts and that the burden to prove that the appellant has in its custody, sums belonging to the judgment-debtor is that of the judgment-creditor who asserts that the judgment-debtor has accounts with the appellant. Counsel submitted that to place on the appellant the burden of proving the existence of banking relationship between it and the judgment-debtors will amount to turning the law on its head.

Learned senior counsel referred to section 87 of the Sheriffs and Civil Process Act and Military Administrator, Federal Housing Authority v. Aro (1991) 1 NWLR (Pt. 168) 405, (1991) 1 SCNJ 154, to submit that in cases where there are conflicting affidavits filed by the parties in a dispute, and the conflict is not on a trivial matter in dispute, it is incumbent on the court to advice the parties to proffer oral evidence to resolve the conflict. Learned senior counsel for the appellant therefore said the lower court has a duty to try the issue regarding the existence or otherwise of bank accounts belonging to the judgment-debtors with the appellant in order to determine the appellant’s liability. Counsel further submitted that the lower court failed to consider the contents of the appellant’s affidavit to show cause dated 14 May 2012 and the appellant’s reply affidavit dated 16 July 2012 in the ruling delivered on 13 November 2012. Learned senior counsel referred to Akpan v. Bob (2010) All FWLR (Pt. 501) 896, (2010) 17 NWLR (Pt. 1223) 421; Mohammed v. Abdulkadir (2008) 4 NWLR (Pt. 1076) 111; Osuoha v. State (2010) 16 NWLR (Pt. 1219) 364, to submit that the duty of the court to consider all the documents placed before it is not one which can be waived.

Learned senior counsel, Adegbomire SAN referred to New Resources Int’l Ltd & Anor. v. Oranusi (2010) LPELR – 4592 (CA), (2011) All FWLR (Pt. 577) 760 and submitted that where a court fails to consider processes filed by a party before it, so doing will amount to a denial of the party’s constitutionally guaranteed right to fair hearing. He further relied on Dalko v. U.B.N. Plc (2004) 4 NWLR (Pt. 862) 123 at 133 and Christlieb v. Majekodunmi (2011) All FWLR (Pt. 592) 1802, (2011) 5 NWLR (Pt. 1240) 294 at 312, to submit that the right to fair hearing is so fundamental that where same has been breached, the entire proceedings become a nullity. Learned senior counsel for the appellant then submitted that the proceedings ought to be set aside. He urged this court to allow the appeal, resolve the sole issue in favour of the appellant and set aside the garnishee order absolute made by the lower court on 13 November 2012. Learned senior counsel for the respondents on the other hand, submitted that there is no dispute as regards the order nisi dated 30 April 2002 which was duly served on the appellant, and that the appellant neither in the notice of appeal nor at any stage raised any complaint against the order nisi. Learned counsel further submitted that contrary to the submissions of the appellant that the lower court lacked powers or jurisdiction to make a garnishee order absolute against the appellant on the ground that the respondents did not prove that the judgment-debtors had funds standing to their credit in the hands of the appellants, the issue of proof cannot impeach the jurisdiction of the court.

Learned counsel for the respondents relied on Oceanic Bank Plc v. Micheal Oladepo (2012) LPELR - 19670 (CA) 27- 28 and Union Bank of Nigeria Plc v. Boney Marcus Industries Ltd & Ors. (2005) All FWLR (Pt. 278) 1037, (2005) 13 NWLR (Pt. 943) 654 at 666 to submit that the order nisi which was a condition precedent for the grant of order absolute was fulfilled and that the garnishee proceedings before the lower court were valid. He contended that the case of C.B.N. v. Auto Import and Export (2013) 2 NWLR (Pt. 1337) 80 relied upon by the appellant was inapplicable in the instant case. Learned counsel referred to Oceanic Bank Plc v. Micheal Oladepo (supra) page 23, paragraph E, to submit that the duty of the appellant upon being served the garnishee order nisi was to file necessary affidavit and documents to show cause why it should not be made to satisfy the debt. Learned counsel referred to paragraph 4 of the affidavit to show cause filed by the appellant dated 14 May 2012 exhibited at pages 14-15 of the record of appeal and argued that the deponent did not testify from his personal knowledge, the affidavit therefore contravenes the provisions of section 115(3) and (4) of the Evidence Act, 2011. Learned counsel contended that the place, date, time and circumstances of the receipt of the information were not disclosed by the deponent. He further contended that Sunday Adegoke, the corporate counsel of the appellant who was said to have given the information to the deponent did not personally carry out the search which was said to have been conducted nor was it shown that it was possible for a search on the account to be carried out by the legal department of the bank. Learned counsel referred to Citizens International Bank Ltd v. SCOA (Nig.) Ltd (2006) All FWLR (Pt. 323) 1680 (2006) LPELR- 5509 (CA) and John Obi v. Udochukwu Ojukwu (2009) LPLER 8511 (CA), (2010) All FWLR (Pt. 533) 1941 to submit that the lower court should have struck out paragraph 4 of the said affidavit to show cause for being hearsay evidence.

Learned counsel further referred to paragraphs 5 and 6 of the affidavit to show cause dated 14 May and the reply affidavit dated 10 July 2012 and contended that none of the two affidavits demonstrated credibility or complied with the order nisi made by the lower court. Learned counsel for the respondents submitted that the order of the lower court as clearly spelt in the order nisi was for the appellant to produce and file the statements of account in respect of account numbers 0008050000000309 and 0008001000013260. He argued that exhibits A1 and A2 filed by the appellant which are documents in respect of account numbers 0100308346 and 0400009879 did not qualify to be the statement of account in that, exhibit A2 merely showed a single transaction while exhibit A1 merely showed debit interest but failed to show the full statement of what warranted the interest. Learned counsel referred to Citizens International Bank Ltd v. SCOA (Nig.) Ltd (supra) at page 19; The Black’s Law Dictionary, 9th Edition, on page 1539 and The Oxford Advanced Learner’s Dictionary, International Student’s Edition, 7th Edition, at page 103 to contend that the documents exhibited by the appellant are by no means qualified to be held as statements of account as the documents failed to show a record of all the money paid into and out of the bank account and the balance due. Learned counsel argued that the appellant being the party who asserted that certain accounts were closed with debit balances failed or refused to place the necessary and material evidence before the lower court in proof of its assertion. He further argued that the appellant held back the vital and material information from the lower court. Counsel referred to Oceanic Bank Plc v. Micheal Oladepo (supra) page 22, to submit that the appellant merely claimed that the accounts kept with it had been closed without placing any proof of the closure or circumstances of the closure before the court. Learned counsel submitted that the duty of confidentiality the appellant owed the judgment-debtors ceases upon an order of a competent court as the lower court directing it to make disclosure relating to the running, position and balances in such accounts. He relied on Uzodinma v. Izunaso (No. 2) (2011) 17 NWLR (Pt. 1275) page 30 to submit that the appellant was under a legal duty to act honestly and not evade the truth, but the appellant did not truthfully make the relevant disclosures.

Learned counsel again relied on Oceanic Bank Plc v. Micheal Oladepo (supra) pages 22 - 23, and section 140 of the Evidence Act. 2011, to contend that only the appellant can present to the court, the true position of the judgment-debtors’ account and give particular details of the account. He submitted that the burden of proof therefore rests on the appellant and does not shift until it is discharged. Learned counsel relied on Zenith Bank v. Igbokwe (2013) LPELR - 21975 (CA) page 24 to further argue that the onus of proving the assertions that the accounts were indeed closed with debit balances rests squarely on the appellant. Learned counsel referred to section 132 of the Evidence Act, 2011, to submit that in the instant case, it was the appellant who would fail if no evidence was adduced and thus ought to have adduced credible evidence to show cause why the garnishee order nisi should be made absolute. Learned counsel submitted that the appellant failed to convince the lower court that it ought to be discharged from the proceedings and that the lower court was therefore right in holding that the appellant failed to show why the order nisi should not be made absolute. On the second issue, that is, whether the appellant who deliberately refused to produce material evidence can complain that it was not accorded fair hearing, learned counsel for the respondents contended that the ruling of the lower court shows that the court evaluated both affidavits filed by the appellant and found that the appellant failed to comply with the order nisi by filing a true statement of the account of the judgment-debtors’ accounts. Counsel relied on Oceanic Bank Plc v. Micheal Oladepo (supra) page 21.

Learned counsel argued that it cannot be said that there is conflict between the appellant’s affidavit dated 14 May 2012 and the respondents’ counter-affidavit dated 5 June 2012 as submitted by the appellant. He submitted that the depositions in the respondents’ counter-affidavit merely presented hints to the appellant on crucial disclosures to make in its reply affidavit. Learned counsel further submitted that it is not in all instances where there is a conflict in affidavits that oral evidence must be called. He referred to Okada Airlines Ltd. v. Federal Airport Authority of Nigeria (2014) LPELR 23342 (CA) 34-35, paragraphs E - C, to submit that the appellant’s deliberate refusal to show the true position of the judgment-debtors’ account supports the position canvassed in the respondents’ counter-affidavit. Learned counsel for the respondents submitted that it is not true that the lower court did not consider the appellant’s reply affidavit. He argued that the lower court, in evaluating the appellant’s reply affidavit found that the appellant rather than make the necessary disclosures, attached processes which it had previously filed before other courts and thereupon urged to be discharged by the lower court herein. These processes were found by the lower court to be irrelevant. Counsel made reference to Okada Airlines Ltd. v. Federal Airport Authority of Nigeria (supra) pages 27-28 and submitted that although the appellant filed two affidavits, it failed to attach cogent proof of the closure of any of the accounts in issue. Learned counsel further submitted that in the circumstance of this case, even if there is conflict, the lower court needed not call oral evidence. Learned counsel for the respondents referred to Saburi Adebayo v. Attorney-General of Ogun State (2008) All FWLR (Pt. 412) 1195, (2008) 7 NWLR (Pt. 1085) 201 at 221 and page 215, to submit that appellant’s counsel failed to consider the entirety of the ruling and that the courts are not bound to make pronouncements on every issue or document where the purport of the issue or document can be dealt with in conjunction with another. Counsel referred to Gitto Construzioni Generali Nigeria v. Etuk & Anor. (2013) LPELR 20817 (CA) to argue further that the test for fair hearing, which the appellant said it was denied by the lower court, ought to be the objective test of justice. He referred to Saburi Adebayo v. Attorney-General of Ogun State (supra) pages 211-222, to submit that appellant’s counsel’s arguments on breach of right to fair hearing is a mere attempt to hide behind and exploit the constitutional provision to mend a fatal case.

Learned counsel submitted that the appellant fully participated in the trial court but grossly failed or deliberately refused to produce material evidence which resulted in the order of the lower court making absolute, the garnishee order nisi. He submitted that the appellant cannot be heard to complain that it was not accorded fair hearing by the lower court. Learned counsel submitted that the lower court’s decision was reached upon proper evaluation of all the material evidence provided by the parties. He submitted that the appellant has not shown that the decision reached by the court was by any means perverse and that there is justification for praying this court to set aside the decision. Learned counsel therefore urged this court to affirm the garnishee order absolute made by the lower court; dismiss the appellant’s appeal and award substantial costs in favour of the respondents.

In reply to the respondent’ submissions, learned counsel for the appellant submitted in the appellant’s reply brief that parties are bound by the records of the court as well as the record of appeal. He referred to Abubakar Audu v. Federal republic of Nigeria (2013) All FWLR (Pt. 676) 484, (2013) 5 NWLR (Pt. 1348) 397 at 408; Attiogbey v. United Bank for Africa Plc (2013) LPELR 20326; Daggash v. Bulama (2004) All FWLR (Pt. 212) 1666, (2004) 14 NWLR (Pt. 892) 144 at 233; Agbahomovo v. Eduyegbe (1999) 3 NWLR (Pt. 594) 170 at 182, (1999) 2 SCNJ 94; Nwora v. Nwabueze (2011) All FWLR (Pt. 589) 1002, (2011) 17 NWLR (Pt. 1277) 699 at 717 - 718 and C.B.N. v. Auto Import aand Export (2013) 2 NWLR (Pt. 1337) 80 - 81, to submit that parties and the court are bound by the records. Learned counsel further submitted that it is clear from the records of appeal that the appellant’s complaint is not against the grant of the garnishee order nisi, but against the order of the lower court which seeks to compel the appellant to pay over funds which do not belong to the respondents, contrary to what is provided by the provisions of the Sheriffs and Civil Process Act.

Learned counsel for the appellant argued that the submissions of the respondents that the issue of proof cannot impeach the jurisdiction of a court to make a garnishee order absolute and the case of Oceanic Bank Plc v. Micheal Oladepo (2012) LPELR - 19670 (CA), relied on Adegoke Motors Ltd v. Adesanya (1989) 7 NWLR (Pt. 109) 250 at 275 to urge this court to disregard the case of Oceanic Bank Plc v. Micheal Oladepo (2012) LPELR - 19670 (CA). Learned counsel submitted that the respondents failed to refer to paragraph 3 of the affidavit at page 14 of the records of appeal which states the source of information contained in the affidavit. He referred to the Black’s Law Dictionary, 10th Edition at page 1456 and Njoemana v. & Anor. (2014) LPELR – 22494 (CA) to submit that the deponent substantially complied with the provisions of section 115(3) and (4) of the Evidence Act, 2011 by stating the name of his informant, the venue the information was supplied and the circumstances under which the information was provided.

Learned counsel referred to section 116 of the Evidence Act, 2011, and Falobi v. Falobi (1976) 9-10 SC 1 to submit that the lower court’s failure and or refusal to call oral evidence while considering the respondents’ counter-affidavits and the appellant’s affidavit to show cause and reply affidavit amounts to a gross violation of the appellant’s constitutional right to fair hearing as well as a violation of the provisions of the Sheriffs and Civil Process Act. He referred to Dalko v. U.B.N. Plc (2004) 4 NWLR (Pt. 862) 123 at 133 and that this court ought to set aside the decision in line with Total Upstream (Nig.) Ltd v. A.I.C. Ltd & Ors. (2015) LPELR - 25388 (CA). Counsel urged this court to resolve the issue for determination in favour of the appellant and set aside the garnishee order absolute made by the lower court on 13 November 2012 and substitute the order with an order with an order discharging the appellant forthwith. Resolution:

It is evidence from the submission of parties that there is no challenge against the garnishee order nisi dated 30 April 2012. The order of the lower court as contained at pages 70 – 71 of the record of appeal is here reproduced:

“It is hereby ordered that an order nisi be and is hereby granted as prayed. The garnishee banks shall file an affidavit showing cause why the order nisi should not be made absolute in respect of any sum held in the account of the judgment debtors/ respondents.

It is further ordered that the said garnishee banks shall file copies of the statement of account along with the affidavit which must be filed within 14 days and the order nisi shall be served on the garnishee banks within 7 days.”

From the submissions of learned counsel, the appellant upon being served the order nisi filed the affidavit to show cause dated 14 May 2012 as contained at pages 14-17 of the record of appeal. The respondents filed a counter-affidavit to the appellant’s affidavit to show cause and the appellant in response filed a reply affidavit. Upon the affidavits filed by parties, the lower court made the garnishee order absolute against the appellant. The sole issue distilled for determination by the appellant in this appeal is whether having regard to the provisions of section 83 of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004, and section 36 of the Constitution of the Federal Republic of Nigeria, 1999, the lower court was right to have entered a garnishee order absolute against the appellant.

Section 83 of the Sheriffs and Civil Process Act, Cap. S6, Laws of the Federation of Nigeria, 2004, provides as follows:

1. The court may, upon the ex parte application of any person who is entitled to the benefit of a judgment 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 maybe sufficient to satisfy the judgment or order together with costs aforesaid.

2. 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. By the above provisions, upon the service of the garnishee order nisi, the garnishee has obligation to show why the court should not order him to pay to the judgment-creditor the debt due from him to the judgment-debtor, that is to say, the garnishee is expected to furnish substantial materials to stop the court from making the order absolute. This obligation, the garnishee must fulfill by filing the affidavit to show cause and attaching relevant documents and materials to show why the garnishee order nisi made against him should be vacated and not be made absolute. In this appeal, the pertinent question is whether it can be said that the affidavit to show cause filed by the appellant herein at the lower court satisfied the requirements of the law stating and establishing by documentary evidence reason(s) why the garnishee order nisi should not be made absolute against the appellant.

I carefully read through the relevant affidavit filed by the appellant which is contained at pages 14 - 17 of the records of appeal. The said affidavit was deposed to by one Olugbenga Akintoye who is a litigation clerk in the law firm of the appellant’s counsel at the lower court. The deponent stated that the facts deposed to in the affidavit were made available to him by the corporate counsel of the appellant. The deponent stated at paragraphs 3, 4, 5 and 6 as follows:

3. That the following facts herein deposed came to my knowledge in the discharge of my duties in chambers and the documents and facts supplied our chambers by Barrister Sunday Adegoke, corporate counsel of 2nd garnishee and I verily believed him as true and correct.

4. That Barrister Sunday Adegoke, corporate counsel of the 2nd garnishee informed us that on receipt of order nisi by the 2nd garnishee, a search was conducted into the 2nd garnishee data bank and the following were extracted.

5. That the judgment-debtors do not have any account with the 2nd garnishee or any sum at all.

6. That account numbers 0008050000000309 and 0008001000013260 hereby attached and marked exhibits ‘A1 and A2’ respectively had been closed since the year 2009 with debit value in the judgmentdebtors’ account.

From the depositions above, it would ordinarily be presumed that exhibits A1 and A2 referred to by the deponent would be the statement of account of the attached account numbers: 0008050000000309 and 0008001000013260, however, what is evident at pages 16 and 17 of the record of appeal is that the exhibits referred to as A1 and A2 are documents in respect of account numbers 0100308346 and 0400009879 both belonging to the judgment-debtor. The attached documents though tendered as statement of the account belonging to the judgment-debtor, I must say that the contents of the exhibits constitute complete mockery of what a statement of account should contain. There is nothing on the face of the documents to show the history of the transactions conducted as per the respective accounts. A fortiori, nothing on record shows the relationship between accounts numbers 0100308346 and 0400009879 on one hand in respect of which statement of accounts were tendered and account numbers: 0008050000000309 and 0008001000013260, the account numbers referred thereto in the order nisi. It is therefore completely strange and incongruous for the appellant to render the so-called statement of account relating to entirely different accounts and believe that it has effectively discharged its obligation.

The action of the appellant in my view does not in the remotest way discharge it from liability. The appellant was evasive and embarked on deliberate design to daze the understanding of the lower court. I think the learned trial judge was swift enough to read through the design and act swiftly. I commend the learned trial judge.

The learned trial judge at page 72 of the record of appeal said as follows and I quote:

“The order nisi was clear and it is trite that the garnishee banks should furnish a statement of account to show the position of the account held by the bank on behalf of the judgment debtors. No time-period was stated. Thus an up-to-date statement of account ought to be furnished. By the affidavit evidence before the court, and the statement of account exhibited, the 1st garnishee bank has limited its self to a period between December 2011 to May 2012. No reason was given for this and no evidence was also provided for the period in 2007 as alleged by the judgment-creditor, and three affidavits have been filed by the 1st garnishee bank, inspite of which the question still remains why a comprehensive statement of account was not provided...”

From the materials before the lower court, the appellant for some inexplicable reasons carefully evaded filing materials disclosing valid and substantial reasons why the order nisi must not be made absolute. The appellant failed to furnish comprehensive statement of account as required by the order of the lower court. The appellant has a duty to ensure that the orders of the lower court are carried out effectively and completely to conclusion. It does not fall within the duties of the appellant bank to proceed to substitute account numbers and present inconclusive statements of account to the court. This brings me to the statement made by Mackinnon L. J, in Hirschorn v. Evans (1938) 2 KB 801, where he said as follows on the duties of a bank served with garnishee order:

“If upon receiving that summons (For E15.7s), the bank had any account in their books in the name of lionel Evans, the judgment debtor, it would have been their duty not to allow Lionel Evans, to draw cheques upon that account so as to reduce the credit balance below the sum of E15.7s.”

The garnishee bank must supply the details of the accounts listed and nothing else. I carefully examined the exhibits A1 and A2, both exhibits relate to different accounts and cannot in my humble understanding take the place of the statement of account contemplated by the order of the lower court, a garnishee bank has obligation to carry out the orders of the court.

In Zenith Bank Plc v. Kano & Ors. (2016) LPELR-40335 (CA) 6-8, this court, per Sankey JCA explained the duty placed on a garnishee bank in the following words:

“... the onus placed on a garnishee would only be discharged where it successfully establishes that the account referred to in the decree nisi does not exist in its system or if it exists, it is heavily in debt and not in credit, or that the number stated on the order nisi had since changed to another version. See Fidelity Bank Plc v. Okwuowulu (2012) All FWLR (Pt. 644) 151, (2012) LPELR - 8497 (CA); Citizens International Bank Ltd v. SCOA (Nig.) Ltd (2006) All FWLR (Pt. 323) 1680, (2006) 18 NWLR (Pt. 1011) 334.”

See also Total Upstream (Nig.) Ltd v. A.I.C. Ltd (2015) LPELR - 25388 (CA) page 45; Zenith Bank Plc v. Omenaka (2016) LPELR - 40327 (CA) pages 24-26 and Union Bank of Nigeria Plc v. Boney Marcus Industries Ltd (2005) All FWLR (Pt. 278) 1037, (2005) 13 NWLR (Pt. 943) 654, (2005) LPELR - 3394 (SC) page 14 - 15.

The appellant made reference to account numbers 0100308346 and 0400009879 without stating or establishing the nexus between the accounts and the accounts against which the order nisi was made and if there was at anytime a change to account numbers 0100308346 and 0400009879. It is therefore clear that the appellant failed to show any cause at all in respect of the account numbers: 0008050000000309 and 0008001000013260. The court is not expected to embark on speculations or logical deductions. Furthermore, the appellant’s affidavit in one breadth posited that the judgment debtors do not have any account with the garnishee bank or any sum at all. On the other hand, it disclosed that the two accounts operated by the judgment debtors had since been closed since year 2009 with debit value in the judgment-debtors’ accounts. It will appear that the depositions contained in the affidavit to show cause are conflicting and self-contradictory. This court cannot be expected to pick and choose which depositions to accord relevance to. Parties confronting the courts with facts must do so with certainty and some good measure of exactness. Parties must not expect the courts to embark on titration process to filter the facts. See: Dale Power Systems Plc v. Witt & Busch Ltd & Anor. (2007) All FWLR (Pt. 394) 353, (2007) LPELR-4011 (CA). More so, in the counter-affidavit in opposition to the appellant’s affidavit to show cause, the respondents deposed to the fact that the accounts of the judgment-debtors were subject to a freezing order by the Investment and Securities Tribunal, albeit interim, as argued by the appellant on 4 December 2007. The appellant failed to give any evidence to the contrary or challenge evidence or ipso facto lead any credible evidence to show that the interim order had been discharged. On the appellant’s contention that its right to fair hearing had been violated. The law is settled that fair hearing connotes fair trial and a party who has been given the opportunity to make his case but fails to do so cannot come under the guise of fair hearing, so doing shall amount to unwarranted grievance. In Nwokocha v. Attorney-General of Imo State (2016) LPELR40077 (SC) page 11-12, the Supreme Court per Ogunbiyi JSC held that:

“The term fair hearing therefore has been defined variously by this court to mean trial conducted according to all legal rules formulated to ensure that justice is done to all parties to the case. See Ogunsanya v. State (2011) All FWLR (Pt. 590) 1203, (2011) 12 NWLR (Pt. 1261) 401 at 434; also Ugoru v. State (2002) 4 SC (Pt. 11) 13 at 19, where U. A. Kalgo JSC said: “the term ‘fair hearing’ in relation to a case in my view, means that trial to the case of the conduct of the proceedings thereof, is in accordance with the relevant law and rules in order to ensure justice and fairness...”

The appellant without doubt was duly served the garnishee order nisi, where the lower court ordered it to file statements of account, as part of its obligation to show cause. The appellant also had the opportunity of filing a reply to the respondents counter-affidavit yet failed to prove its case by providing relevant material evidence stating the position of the judgment-debtors’ accounts. There is therefore no violation of fundamental right to fair hearing as argued by the appellant in this case. The process of fair hearing is a two-edged sword that cuts both ways, both the appellant and the respondents have equal right to fair hearing. These rights must be balanced; one cannot be sacrificed to the other without perverting justice. See also Mbanefo v. Molokwu & Ors. (2014) All FWLR (Pt. 742) 1665, (2014) LPELR – 22257 (SC) page 47; Ogboro v. Registered Trustees of Lagos Polo Club & Anor. (2016) LPELR - 40061 (CA) page 22 and INEC v. Musa (2003) FWLR (Pt. 145) 729, (2003) LPELR – 1515 (SC) page 94.

On the whole, I am of the view that the appellant failed in its duty to show cause why the garnishee order nisi should not have been made absolute by the lower court. I find this appeal wholly unmeritorious and therefore deserves to be and is hereby dismissed. The order of the lower court made on 13 November 2012 is hereby affirmed by me. Parties shall bear their respective costs.

**GARBA JCA:**

I have read a draft of the lead judgment delivered by my learned brother, Tijjani Abubakar JCA in this appeal. From the record of the affidavit evidence filed by the appellant and the respondents in respect of the garnishee order nisi, made against the appellant, I am satisfied and so agree with the lead judgment, that the appellant did not make a full and frank disclosure of the position of the accounts in respect of which the order nisi was issue, by the High Court against it. For instance, in one breath, the appellant says that the accounts with it were closed since the year 2009, but in another, filed extracts of the accounts with different numbers for the years 2011-2012, showing figures in debit. The appellant deliberately avoided compliance with the order nisi to file statements of the accounts in question showing record of transactions therein up to the date the order was served on it.

The appellant did not sincerely produce evidence before the lower court to reasonably satisfy it that there was no banking relationship between it and the judgment-debtors or that their accounts with it are in the debit and hold no funds to be paid in satisfaction of the judgment debt. It was its legal duty to have done so in answer to the order nisi of showing why the order should not be made absolute against it. Diamond Bank Ltd. v. Ndubuisi (2002) FWLR (Pt. 105) 727; Citizens International Bank Ltd v. SCOA (Nig.) Ltd (2006) All FWLR (Pt. 323) 1680, (2006) 18 NWLR (Pt. 1011) 334.

I have also read the ruling appealed against and apparently, the affidavit evidence filed by the appellant on 14 May 2012 and 16 July 2012 were duly considered by the lower court before deciding to make the order nisi absolute. It is therefore a misconception of the principle of fair hearing to allege failure by that court to have considered the said affidavit simply because the evidence was held not to be sufficient to warrant a discharge of the order nisi. Due to the casual manner and frequent verbalism with which parties fling the allegation of denial of fair hearing in judicial proceedings because of its fundamental and crucial effect, recently in the case of Tetrazzini Foods Ltd v. Abbacon Investment Ltd (2015) LPELR 25007, it was cautioned that:

“It has become a fashion for litigants to resort to their right to fair hearing - as if it is a magic wand to cure all their inadequacies. But it is not so and cannot be so. The fair hearing constitutional provision is designed for both parties in litigation in the interest of justice. The courts must not give a burden to the provision which it cannot carry or shoulder. Fair hearing is not a cut and dry principle which parties can in the abstract, always apply to their comfort and convenience. It is a principle which is based and must be based on the facts of the case before the court.”

See also Gbadamosi v. Dairo (2007) All FWLR (Pt. 357) 812, (2007) 1 SCNJ 444; Okike v. Legal Practitioners Disciplinary Committee (2005) All FWLR (Pt. 266) 1176, (2005) 5 SCNJ 596.

The lower court did not in the ruling, deny the appellant’s right to fair hearing since the relevant and material evidence adduced by it was appraised and considered in the decision to make the order nisi absolute. For the above and reasons set out in the lead judgment, I join in dismissing the appeal for lacking in merit.

**OBASEKI-ADEJUMO JCA**:

I have been afforded the privilege of reading a draft copy of the lead judgment just delivered by my learned brother, Tijjani Abubakar JCA. The issues raised for determination have been exhaustively addressed and I agree with the reasoning and conclusion contained therein. However, I would like as a way of addition to add just a few words particularly, on the main issue which touches on: whether the appellant in the instant appeal was able to diligently discharge its duty of showing cause why the garnishee order nisi should not have been made absolute by the lower court. The law governing garnishee proceedings and the onus placed on a garnishee ordered to show cause by a court, largely requires that a garnishee be transparent and show a statement of account of a named account and if any other account to satisfy the court that there is nothing to hide. I must say that it is not the duty of a garnishee to protect the debtor by producing evasive or incorrect statement of account, after all, they are merely custodians and not the owners of the said funds to be garnisheed. The first duty of a garnishee is to the court that made the order. The earlier the banks or custodian of funds and the debtors/ counsel representing debtors in any suit understands this point, the society and our jurisprudence will be better and richer for it.

In Zenith Bank Plc v. Omenaka (2016) LPELR – 40327 (CA), the court held, per Georgewill JCA, thus:

“...the onus placed on a garnishee would only be discharged where it successfully establishes that the account or accounts covered by the garnishee order nisi does not exist in its system or if it exist, it is in debt and not in credit or that it has a right of set off or lien which are due effective against the customer. See also Union Bank of Nigeria Plc v. Boney Marcus Industries Ltd & Ors. (2005) All FWLR (Pt. 278) 1037 at 1046 - 1047, (2005) 13 NWLR (Pt. 943) 654 at 666; Fidelity Bank Plc v. Okwuowulu (2012) All FWLR (Pt. 644) 151, (2012) LPELR - 8497; Citizens International Bank Ltd v. SCOA (Nig.) Ltd (2006) All FWLR (Pt. 323) 1680, (2006) 18 NWLR (Pt. 1011) 334, (2006) LPELR- 5509.”

In this case, I agree that the garnishee failed to discharge the onus on it to show successfully that there is no credit in the named account or any account system belonging to the debtor.

Hence, it is for this reason and all other reasons as contained in the lead judgment that I too find the appeal lacks merit and it is hereby dismissed. I abide by the consequential orders in the lead judgment, including order as to cost.

Appeal dismissed