**ACCESS BANK PLC**

**v.**

**ORIJEH**

COURT OF APPEAL (BENIN DIVISION)

CA/B/74/2016

SATURDAY, 1 JULY 2017

**LEX (2017) - CA/B/74/2016**

**OTHER CITATIONS**

3PLR/2017/13 (CA)

**BEFORE THEIR LORDSHIPS:**

PHILOMENA MBUA EKPE JCA (Presided)

SAMUEL CHUKWUDIMEBI OSEJI JCA

M. NASIRU ONIYANGI JCA (Read the Lead Judgment)

**BETWEEN**

ACCESS BANK PLC – Appellant

AND

1. MRS. BRIDGET ORJIEH

2. MR. SUNDAY ORJIEH

(For themselves and on behalf of the Dependants of Late Lucky Orjieh) - Respondents

**ORIGINATING COURT**

FEDERAL HIGH COURT, ASABA JUDICIAL DIVISION (C.M.A. Olatoregun-Isola J., Presiding).

**REPRESENTATION/LAWYERS**

C. P. OGUCHENTI - for the Appellant.

E. C. IKENWE - for the Respondents.

**PRACTICE AND PROCEDURE ISSUES**

APPEAL - GARNISHEE ORDER:- Nature of - Execution of – Pending motion for stay of - Whether operates as stay.

EVIDENCE - UNCHALLENGED AND UNCONTRADICTED EVIDENCE - Credibility of - Proper approach of trial court thereto.

**CASE SUMMARY**

ORIGINATING FACTS AND CLAIMS

The respondent herein by way of a motion ex-parte dated 22 May 2014 and filed on 26 May 2014 prayed the trial court for the following orders:

(1) A garnishee order directing that the sum of money or credit balance in account No. 0059694210 held by the defendant/respondent/judgment debtor with garnishee i.e. Access Bank Plc. Asaba, be attached to satisfy the judgment sum of N3,000,000.00 (Three Million Naira) and N30,000.00 (Thirty thousand Naira) as cost awarded in this suit together with the cost of these garnishee proceedings.

(2) An order directing the garnishee to show cause why the judgment debt claimed to be due to the judgment debtor/respondent should not be attached from their account with it to answer the judgment sum and cost of the garnishee proceedings.

(3) And for such order(s) as this honourable court may deem fit to make in the circumstance of this case.

In his considered ruling delivered on 2 July 2015, the trial court granted the reliefs sought and made the order nisi absolute. Being dissatisfied with the ruling, the appellant appealed.

**DECISION(S) APPEALED AGAINST**

The trial Court ruled in favour of the Respondent, granting the reliefs sought, making the Decree Nisi already granted absolute, hence the appeal by the Appellant.

This appeal is against the Ruling of the Federal High Court, Asaba Judicial Division holding at Asaba delivered on 2 July 2015 in suit No. FHC/ASB/CS/73/2010 by Hon. Justice C.M.A. Olatoregun-Isola, wherein the learned trial judge of the lower court consequent upon hearing an application by the respondent herein which is by way of a motion ex-parte dated 22 May 2014 and filed on 26 May 2014 praying the court for the following orders:

In his considered ruling delivered on 2 July 2015, the court granted relief sought and made the order nisi absolute.

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

*BY APPELLANT:*

“(1) Whether the lower court rightly made its garnishee order nisi of 28 October 2014 absolute in the face of the disclosure made by the appellant in its affidavit showing caused (sic).”

*BY RESPONDENTS*

“(1) Whether considering the parties affidavit evidence, the lower court rightly made its garnishee order nisi of 28 October 2014 absolute.”

*AS ADOPTED BY COURT*

[The Court adopted the Issues presented by the Respondent]

**MAIN JUDGMENT**

**ONIYANGI JCA** (Delivering the Lead Judgment): This appeal is against the Ruling of the Federal High Court, Asaba Judicial Division holding at Asaba delivered on 2 July 2015 in suit No. FHC/ASB/CS/73/2010 by Hon. Justice C.M.A. Olatoregun-Isola, wherein the learned trial judge of the lower court consequent upon hearing an application by the respondent herein which is by way of a motion ex-parte dated 22 May 2014 and filed on 26 May 2014 praying the court for the following orders:

(1) A garnishee order directing that the sum of money or credit balance in account No. 0059694210 held by the defendant/respondent/judgment debtor with garnishee i.e. Access Bank Plc. Asaba, be attached to satisfy the judgment sum of N3,000,000.00 (Three Million Naira) and N30,000.00 (Thirty thousand Naira) as cost awarded in this suit together with the cost of these garnishee proceedings.

(2) An order directing the garnishee to show cause why the judgment debt claimed to be due to the judgment debtor/respondent should not be attached from their account with it to answer the judgment sum and cost of the garnishee proceedings.

(3) And for such order(s) as this honourable court may deem fit to make in the circumstance of this case. In his considered ruling delivered on 2 July 2015, the court granted relief sought and made the order nisi absolute. See page 101 of the record of appeal where the court ordered as follows:

“Since no sufficient reason is apparent from the affidavit to show cause, the garnishee order nisi has to be made absolute. Consequently, and in the light of the above, the garnishee order nisi made on 28 October 2014 against the account of the judgment debtor in the custody of Access Bank Plc, Asaba branch (the Garnishee) is here by made absolute.”

The foregoing order did not go well with the appellant hence, this appeal.

The fact of the case leading to this appeal can be summarised as follows:

Mr. Lucky Orjieh deceased was a vehicle spray-painter who had his workshop at Dennis Osadebey Way, behind Customs Office, Asaba, Delta State. He was arrested by the police in his workshop on 7 February 2006 on the suspicion that he had in his workshop, a Mercedes Benz Car (ash colour) which was suspected to have been stolen. He was detained at the ‘B’ division police station cell. He was interrogated and asked to provide the owner of the vehicle by the investigating police officer in person of Sergeant George Obodo of the Anti-Fraud Section of the Delta State Police Command. The deceased produced the owner who is called Mr. Frank. After producing the owner, the deceased’s brother, Mr. Sunday Orjieh requested the police to release the deceased on bail since he had produced the owner of the said Mercedes Benz, which is suspected to have been stolen. The said Sergeant George Obodo was said to have demanded a sum of N20,000.00 for the bail of the deceased. Both Mr. Sunday Orjieh, who is the brother of the deceased and the wife of the deceased told Sergeant that they do not have N20,000.00 for the bail of the deceased. Meanwhile, the police released the said Mr. Frank, the owner of the vehicle on bail and released the said Mercedes Benz suspected to be stolen to him.

Surprisingly, it came to the limelight that the said Mr. Lucky Orjieh had died in the police custody and his body was deposited in the mortuary of the Federal Medical Centre, Asaba on 10 February 2006 by the police. No notice of his death was communicated to his relatives. The family got to know of this upon their subsequent visit to the police station in pursuit of their bid to get the deceased released on bail. Autopsy conducted by one Dr. Louis Esenwa of the Federal Medical Centre, Asaba and his team reveal that the cause of death of Lucky Orjieh was not natural but due to head and trunk injuries with intracamal bleeding. The deceased brother Mr. Sunday Orjieh and the widow, Mrs. Bridget Orjieh instituted a suit for themselves and on behalf of the dependants of late Mr. Lucky Orjieh at the Federal High Court Asaba claiming the sum of N3,000,000.00 (Three million naira) against the Commissioner of Police Delta State command. The defendant failed to defend the action despite many hearing notices issued and served on them. In the end, the court entered judgment in favour of the respondent in this appeal and against the Commissioner of Police, Delta State. When the judgment sum was not paid, the respondent initiated a garnishee proceeding. The court granted the order and the garnishee order nisi was made absolute against the appellant. (Access Bank Plc). Against the order absolute against the garnishee (Access Bank Plc), hence this appeal.

The notice of appeal dated 19 August 2015 was filed on 20 August 2015. It contains only one ground. I hereinunder reproduce the sole ground of appeal with the particulars.

Ground of appeal:

(1) The learned trial judge erred in law when she assumed jurisdiction and made an order absolute directing the garnishee/appellant to pay the judgment sum and costs of N3,000,000.00 (Three Million Naira) and N30,000.00 (Thirty thousand naira), respectively, to the judgment creditors/respondents.

Particulars of error:

(a) The respondents sought to garnish account number 0059694210, purportedly in the name of Commissioner of Police, Delta State, the judgment debtor in the garnishee proceedings at the lower court.

(b) The appellant as garnishee, in its affidavit showing cause, disclosed that account number 0059694210, domiciled with the appellant and sought to be garnished, is not in the name of the Commissioner of Police, Delta State, but belong to Delta Command Security.

(c) The appellant further disclosed that account number, 0059694210, has been the subject of appeal at the Court of Appeal, Benin Division, in Appeal No.CA/ BN/184/2014: Asiekwu Brothers Associates Nig. Ltd v. Mr. Alex Gwozah and three others.

(d) Exhibit ‘A’ which is the notice and grounds of appeal, annexed to appellant’s affidavit showing cause, was unduly discountenanced by the lower court in arriving at her findings in the suit.

(e) The lower court in hearing the present application, assumed appellate jurisdiction in this case, having previously, on 12 May 2014, refused a similar application sought by the judgment creditors/ respondents.

(f) The lower court totally discountenanced the appellant’s affidavit showing cause and failed to heed to the disclosures contained therein.

Relief sought:

To allow the appeal and set aside the ruling of the lower court. On 19 February 2016, the record of appeal was transmitted but out of time. Consequent upon the order of this court granted on 31 October 2016, the said record of appeal was deemed as properly compiled and transmitted. Respective counsel filed their briefs of argument,

Appellant’s brief of argument:

The appellant’s brief was authored by C.P. Oguchient Esq., dated and filed on 19 February 2016. The appellant’s reply brief is dated and filed on 11 November 2016. Both briefs were adopted by the learned counsel representing the appellant on 4 April 2017. He urged the court to allow the appeal and set aside the ruling of the lower court.

Respondent’s brief of argument:

The respondent’s brief of argument is dated 31 March 2016 and filed on 4 April 2016. It is authored by E. C. Ikenwe Esq. Consequent upon his adoption of the said brief on 4 April 2017, he urged the court to dismiss the appeal and affirm the ruling of the lower court.

Issues for determination:

Appellant:

The following is the sole issue distilled by the appellant for the determination of this appeal.

(1) Whether the lower court rightly made its garnishee order nisi of 28 October 2014 absolute in the face of the disclosure made by the appellant in its affidavit showing caused (sic)

Respondent brief of argument:

In the same way, the learned counsel representing the respondent distilled the following lone issue for the determination of this appeal.

(1) Whether considering the parties affidavit evidence, the lower court rightly made its garnishee order nisi of 28 October 2014 absolute.

I have read and compared the respective lone issue by counsel. In my view, they are same in content and purpose. But having regard to their composition, I would prefer to adopt the sole issue distilled by the respondent for the determination of the appeal. This is simply because it is clearer and elegantly drafted.

Issue for determination:

Whether, considering the parties’ affidavit evidence, the lower court rightly made its garnishee order nisi of 28 October 2014 absolute.

The contention of the appellant on this issue is that the law does not compel a garnishee who has shown cause why the amount stated in the garnishee order nisi of court should not be paid to the judgment creditor, to pay the amount stated in the order, where the order does not state particulars of the judgment debtor’s account. He relied on sections 83 and 87 of the Sheriffs and Civil Process Act Cap. 65, Laws of the Federation of Nigeria, 2004. He argued that upon receipt of the garnishee order nisi, he filed an affidavit showing cause why the appellant could not pay from the attached account. He relied on paragraphs 4, 5 and 6 of his affidavit. Based on the averments in those paragraphs of his affidavit, he has been able to satisfy the requirement of sections 83 and 86 of the Sheriffs and Civil Process Act. Further to this, it is also the contention of the appellant that the account in issue which is (No. 0059694216) sought to be attached was subject of an appeal and there was a pending stay of execution of the judgment of court still pending. Regardless of the disclosure, the court still went ahead to issue the order absolute. He relied on the unreported cases of Dr. Aleyander Gaadi & 13 Ors. v. F.R.N, CBN & 2 Ors. unreported suit No. FHC/MKD/CS/41/01 and FHC/MKD/CS/6/ 02, CA/E/244M/07. Let me quickly put on record here that, the appellant seems not to know how to cite decided cases. He does not seem to have allowed the rule of that part of practice to pass through him. He needs a refresher course to update himself. He submitted that the case of Purification Techniques Nigeria Ltd (PTN) v. Attorney-General, of Lagos State (supra) relied upon by the lower court is no longer the law and proceeded to cite in aid of his submission, the case of S.T.B. Ltd v. Contract Resources (Nig.) Ltd (2001) 6 NWLR (Pt. 708) 115. He argued that when an appeal is pending, all pending proceedings must be stayed including contempt. He relied on Group Danone v. Voltic (Nig.) Ltd (2008) All FWLR (Pt. 417) 51, (2008) 7 NWLR (Pt. 1087) 637.

He submitted that in this matter at hand, the appellant dislosed that the account No. 0059694210 sought to be attached was domiciled with her, but that same was in the name of Delta Command Security and her Commissioner of Police, Delta State whom the respondent had sued. After citing the case of Awuse v. Odili (2005) All FWLR (Pt. 261) 248 at pages 321 - 322, paragraphs H - C to buttress his submission, that any party who desires a court to find in his favour, should put across to the court, essential materials that would aid the court in taking a decision in his favour. In conclusion, he urged the court to allow the appeal and set aside the ruling of the court. The respondents in his brief, argued that sections 83, 87, 88, 89 and 91 of the Sheriffs and Civil Process Act Cap. 65, Laws of the Federation of Nigeria, 2004 empowers the court to make orders directing the garnishee to pay/liquidate the judgment debt where the cause shown by the garnishee is unsatisfactory. The filing of an affidavit showing cause per se does not authentically entitle a garnishee to be discharged from satisfying the judgment debt where reasons furnished by the garnishee for its refusal to liquidate the debt is insufficient. He referred to section 83 of the Sheriffs and Civil Process Act. He argued further that the earlier decision of the court discharging the garnishee on 12 May 2013 is not a final decision but an interlocutory one, as it did not finally dispose of the right of the judgment creditor to recover the judgment debt. He relied on the case of Union Bank of Nigeria Plc v. Boney Marcus Industries Ltd (2005) All FWLR (Pt. 278) 1037 at pages 1046 - 1047, (2005) 13 NWLR (Pt. 943) 654 and section 91 of the Sheriffs and Civil Process Act. He submitted that the refusal of the court to grant an interlocutory application does not necessarily constitute a bar to a fresh or similar application being brought when there emerges new facts in the matter. He contended that as at the time the garnishee was earlier discharged, the fact that the Delta Command is one and the same person as the Commissioner of Police, Delta and the fact that the account number 0059694210 being held in the name of Delta Command Security belong to the judgment debtor remained undisclosed to the court. He referred to pages 44 and 45 of the record of appeal and the ruling of the trial court at pages 98 and

He urged the court to hold that the lower court was right in entertaining the subsequent garnishee application in view of the emergence of the new uncontroverted fact that the Delta Command Security is one and the same as the commissioner of police, Delta State and that the account number 0059694210 being held in the name of Delta Command Security belong to the same judgment debtor. He added that the photocopies of notice of appeal and motion for stay of execution are for an entirely different suit and to which the respondent is not a party. He contended that the documents relating to the said appeal are not certified and hence cannot be acted upon. He relied on sections 90(1), (c), 102, 103, 104 and 105 of the Evidence Act, 2011. He referred to the cases of Minister of Lands, Western Nigeria v. Azikiwe (1969) 1 All NLR 49, (1969) NSCC (Vol. 6) 31; Araka v. Egbue (2003) FWLR (Pt. 175) 507, (2003) 17 NWLR (Pt. 848) 1 at page 19, (2003) 9 MJSC 17; Onobruchere v. Esegine (1986) 1 NWLR (Pt. 19) 799, (1986) 2 SC 385, (1986) l All NLR (Pt. 1) 238.

Relying on paragraphs 7, 8, 9, 10, 11, 12 and 13 of the supporting affidavit of the respondent to the motion ex-parte dated 22 May 2016 and filed on 26 May 2016, he submitted that the averments are unchallenged and that where averments in an affidavit are not controverted, it is tantamount to an admission. He relied on the case of State v. Commissioner For Boundaries (1996) 37 LRCN 603 at 607. Further, he argued that a denial in an affidavit must be specific and not general. The averment in an affidavit which has not clearly, unequivocally and directly denied is deemed admitted. He relied on the following cases: LawsonJack v. Shell Petroleum Development Co. (Nig.) Ltd (2002) FWLR (Pt. 120) 1697, (2002) 13 NWLR (Pt. 783) 180, (2002) 7 SC (Pt. 11) 112; Registered Trustees, National Association of Community Health Practitioners of (Nig.) & Ors. v. Medical and Health Workers Union of (Nig.) & Ors. (2008) All FWLR (Pt. 412) 1013, (2008) 1 SC (Pt. 111) 1, (2008) 34 NSCQR (Pt. 1) 321, (2008) 71 SCNJ 348.

He submitted that in so far as there is uncontroverted evidence that a judgment debtor is the same owner of the account sought to be attached, the mere fact that the said judgment debtor holds that account in a different name, will not preclude the court from making a garnishee order for the money in that account to be attached in satisfaction of the judgment debt. In the light of the foregoing argument, he urged the court to dismiss the appeal and affirm the decision of the lower court. Upon a sober reading of the foregoing submission and after considering the sole issue for the determination of this appeal, I am of the view that the question that is yearning for answer is whether or not the learned trial judge rightly made the order nisi absolute in the face of the averments in the affidavit by the garnishee (Access Bank).

The view of the appellant is that after the trial court has discharged the garnishee in the first instance, he can not again order the garnishee to pay the judgment debt based on a subsequent application by the judgment creditor. Let me put on a record that a garnishee proceedings is a means of collecting a monetary judgment against a defendant by ordering a third party (the garnishee) to pay the money, otherwise owed to the defendant, directly to the plaintiff. It is a process of enforcing a monetary judgment by the seizure or attachment of the debts due or accruing to the judgment debtor which forms part of his property available in execution. In other words, it is in the hands of a third party whereby, a court order is required to direct the third party to pay directly to the judgment creditor. See Union Bank of Nigeria Plc v. Boney Marcus Industries Ltd (2005) All FWLR (Pt. 278) 1037 at pages 1046 - 1047, (2005) 13 NWLR (Pt. 943) 654. The bone of contention by the appellant is that the account attached is not that of the Commissioner of Police, Delta State but that of the Delta Command Security. The trial court based on this fact in the first instance refused the application by the respondent to make the order nisi absolute. This led to the filing of another ex-parte motion where in the judgment creditor posited that the said account regardless of the difference in name is maintained by the Commissioner of Police, Delta State. The garnishee did not debunk the fact and based on that uncontroverted averment, the learned trial judge made the order nisi, absolute. By section 83 of the Sheriffs and Civil Process Act the court is empowered to make an order nisi absolute after complying with the procedure prescribed therein. For better understanding, I reproduce hereinunder, section 83:

“The court may upon the ex-parte application of any person who is entitled to the benefit of a judgment for the recovery of 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 debt owing from such third person, herein after called the garnishee, to such debtor shall be attached to satisfy the judgment or order, together with the cost 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.”

Another provision of the Sheriffs and Civil Process Act that I consider relevant in this circumstance is section 90. It reads thus:

“Upon the appearance of such third person after hearing his allegation and those of any other person whom the court may order to appear, the court may order execution to issue to levy the amount due from the garnishee, or any issue or question to be tried and determined, and may bar the claim of such third person, or may make such other order upon such terms with respect to any lien or charge or other wise, as the court shall think just.”

The appellant’s contention as I said before is that the account attached is not that of the Commissioner of Police of Delta State but that of Delta Command Security, where as the respondent deposed to an affidavit stating that both the commissioner of police and the Delta Command Security are one and same. This contention of the respondent was neither denied nor controverted. Evidence which is unchallenged and uncontradicted is credible and ought to be accepted as there is nothing on the other side to balance.

See Hilary Farms Ltd v. M/V “Mahtra” (2007) All FLWR (Pt. 390) 1417, (2007) 14 NWLR (Pt. 1054) 210, (2007) 30 NSCQR 566, (2007) 6 SC (Pt. 11) 85 at 114; Bendel Feeds v. Flour Mill Ltd (2008) 7-12 SC 151 at 187.

Assuming the appellant has done this, then the process prescribed under sections 88, 89, leading to 90 of the Sheriffs and Civil Process Act would have been adopted by the court. But surprisingly, the appellant did not join issue on this vital point to warrant the court to put the assertion into trial. I am also not unmindful of the procedure for interpleaded summons. One would have also expected such “Delta Command Security” to take advantage of such process if truly is not same with the Commissioner of Police, Delta State.

The appellant also argued that there is a pending appeal in respect of the same account number 0059694210 between Asiekwu Brothers Association Nigeria Ltd and Mr. Alex Gwozah (DSP) & 3 Ors and Access Bank Plc & 12 Ors. And there is a pending motion for stay of execution filed by the appellant in suit No.A/M/25/2013.

In my view, the mere fact that there is a pending motion for stay of execution in another matter against the same garnishee and there is a pending appeal does not stop any other party who wants to garnishee the same account with the same bank to so do. It is worthy of note that the motion is yet to be moved. That is to say that no order for stay has been granted. The appellant has not shown any nexus between that case and this at hand. That proceeding cannot inhibit the respondent in this appeal from pursuing the process to reap the fruit of the success of his case. That is to say that there could be more than one garnishee proceeding at the same time against a given garnishee. Once it is certain that the judgment debtor maintains an account and has some amount of money standing to his credit with the garnishee, a judgment debtor can commence proceedings to attach the account. This argument by the appellant therefore, is devoid of any probative value and it is discountenanced. Let me put on record that by the nature of garnishee proceedings it could be classified as one that is sui generis. It is a proceeding in a class of its own distinct from that process for enforcement of judgment by writ of execution. See Nigerian Agip Oil Company Ltd v. Peter Ogini (2011) 2 NWLR (Pt. 1230) 131. That is why it is only against a garnishee that execution under garnishee proceedings could be levied and not against the judgment debtor. See UBA Plc v. Ekpanem (2010) 6 NWLR (Pt. 1190) 207 at 222.

In the light of the foregoing, and considering the fact that evaluation of evidence is the primary duty of the trial court, it is my view that the learned trial judge of the lower court in the instant appeal has properly considered the affidavit evidence before it, put forward by parties and upon which he found for the respondent judgment creditor. The contention by the appellant that the court cannot again entertain another application against the garnishee, having refused the first application is a misconception. As long as the judgment debtor can fish out fresh fact about the account maintained by the judgment debtor, he is at liberty to initiate garnishee proceedings against the garnishee who has in his custody the judgments debtor’s money.

On this note, I find no justifiable reason to disturb the finding and conclusion of the lower court. Rather, I have no hesitation in coming to the conclusion that the learned trial judge was right in making the garnishee order nisi, absolute. This issue is therefore resolved against the appellant and in favour of the respondent.

The appeal therefore is declared unmeritorious and dismissed.

The ruling of Federal High Court Asaba in Suit No. FHC/ ASB/CS/73/2010 delivered on 2 July 2015 coram Hon. Justice C.M.A. Olatoregun-Isola is hereby affirmed. A token cost of N100,000.00 is awarded against the appellant and in favour of the respondent.

**EKPE JCA**: My learned brother, M. N. Oniyangi JCA had obliged me with a copy of the lead judgment just delivered. I am in total agreement with his reasoning and conclusions reached therein that the appeal is devoid of merit and ought to be dismissed. I hereby dismiss same and abide by the consequential order of my lord in the lead judgment.

Appeal dismissed.

**OSEJI JCA:** I had the privilege of reading in draft, the judgment just delivered by my learned brother, Mudashiru Nasiru Oniyangi JCA. I agree with the reasoning and conclusion contained therein. I also hold that the appeal is unmeritorious and it is hereby dismissed. I abide by the consequential orders made in the lead judgment including order as to costs.

Appeal dismissed