

Review Article

Jurisdictional Issues in Debt Recovery Matters

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Abstract: The jurisdiction of debt recovery processes seems clear enough under the Constitution. However, in practice, there is usually some complication and certainty on the matter whenever ancillary orders, third party notices and claims arise from debt recovery. This intellectual sojourn therefore considers cases and legislations on this subject matter. An analysis of the enforcement of court orders nationally and beyond borders is also made and recommendations on the way forward have been proposed for better guidance of Law students, law practitioners and the judiciary.

Keywords: Writ of *fifa*: A document issued by a clerk of court to record a loan on the judgement debtor's property. Writ of sequestration: This means an interim attachment of immovable property of a judgment debtor. Garnishee proceedings: A judicial proceeding in which a creditor asks the court to order a third party indebted to the creditor to cede, any of creditors property in possession of the 3rd party. Immovable property: Property that cannot be moved from place to place e.g. land. Sheriff: Chief executive officer of a court with administration and judicial functions. Precipe: A legal writ commanding a person to do something or to appear and show cause why he or she should not.

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1. INTRODUCTION

Sometimes, individuals, their lawyers, judicial officers and academics have entertained some confusion or uncertainty as to which court of record has the requisite jurisdiction to entertain many causes of action pertaining to debt recovery.

Nevertheless, Section 251 (1) (d) of the Constitution of the Federal Republic of Nigeria 1999, readily provides that both the Federal High Court and the State High Courts have the power to settle disputes between an individual customer and his bank. In effect, both the Federal High courts and the State High Courts have concurrent jurisdictions over Banker/Customer Relationship issues.

Accordingly, in the case of *University of Calabar v AMCON & ORS* [¹], the Court boldly tried to elucidate the rules on this subject by stating that the 3rd party notice served on the Appellant was in respect of a simple contract between the 2nd - 4th respondents on one hand and the Appellant/the (University) respondents on the other hand. It was not in dispute that the AMCON Act confers power on the Federal High

Court to hear actions on recovery of debts. However, the 3rd party notice of proceedings between the Appellant and the 2nd - 4th respondents was also claiming recovery of debts flowing from a contract for which funds had been obtained from a third party, Union Bank Plc, to perform. It would have been fatal and a rape of justice if the debtor who averred that the money was in the hands of another debtor, was not admitted in the course of recovering the debt.

In fact, the very nature of third party notice procedure is to avoid multiplicity of such actions and shorten litigation time. The Court explained the objectives as follows: " The objective of third party procedure notice is to prevent multiplicity of proceedings and the possibility of the same questions being litigated twice [²]. Thus, it is best to settle all matters in controversy once and for all. It ought to be noted, in addition, that the procedure applies not only to cases of contribution and indemnity but also to cases where any relief or remedy claimed by the defendant relates to or is connected with the original subject matter of the action and is substantially the same as some relief or remedy claimed by the plaintiff and to

¹ (2019) LPELR-47309 (CA). See *Bank of Ireland v UBN & Anor* (1998) LPELR - 744(SC)

² *Standard Securities Ltd. v. Hubbard* (1967) Ch. 1056 at 1059

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cases where any question or issue which relates to or is connected with the original subject matter of the action, should be determined not only as between the plaintiff and the defendant but as between either or both of them and the third party [3]. The need to make the 3rd party a party to the proceedings is the overriding need for the third party to be bound by the ultimate result of the action and the questions to be settled or resolved are prime considerations [4]. Besides, the provisions of Order 11 Bendel State (Civil Procedure) Rules, 1988 allow for third party procedure in Rules 12(1) and (2) (in pari materia with the English Rule of Supreme Court Order 16) and are relevant and applicable as follows: "(1) Where, in any action, a defendant claims against any person not already a party to the action (in this section called 'the third party') (a) that he is entitled to contribution or indemnity; or (b) that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or (c) that any question or issue relating to or connected with the said subject-matter is substantially the same as some question on the issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and defendant and the third party or between either of them; the Court or Judge in chambers may give leave to the defendant to issue and serve a third party notice. (2) The Court or judge in chambers may give leave to issue and serve a third party notice on an ex parte application supported by an affidavit, or where the Court or judge in chambers directs a summons to the plaintiff to be issued upon the hearing of the summons: provided that leave shall not be granted in cases where the action was begun and an order for pleadings made before the date of the commencement of these rules [5]". In this case, there is no dispute on the contract and its debts had not been settled. Accordingly, AMCON is simply being asked to collect the debt and convert it to what the 2nd - 4th respondents owe it, this then becomes an ancillary claim which the Court must determine [6].

In effect, the writ and claim select the jurisdiction of a Court. In this case, the introduction of AMCON has selected, by statute, the Federal High Court. It will defeat the purpose of a 3rd party notice to hold otherwise. Consequently, the simple contract cases

³ Chatsworth Investment Ltd. v. Amoco (U.K.) Ltd. (1968) Ch. 665, C.A. (iii)

⁴ (1982) 12 S.C.1; Green v. Green (1987) 3 NWLR (Pt.61) 480; Odu'a Investment Co. Ltd. v. Talabi (1991) 1 NWLR (Pt.170) 761 and Governor of Oyo State v. Folayan (1995) 8 NWLR (Pt. 413) 292. (iv). vide Peenok Investment Ltd. v. Hotel Presidential Ltd.

⁵ Bullen and Leake and Jacob's Precedents of Pleadings, Twelfth Edition by I.H. Jacobs at page 1365." per Onu, J.S.C (PP. 23-25, PARAS. A-C).

⁶ Merrill Guaranty Savings & Loans Ltd v World (Supra)

cited are not applicable herein as this is not a straight forward simple contract case, but It is a relief connected with the debt recovery which by Section 53 of AMCON Act is within the context of Section 251 (1) of the 1999 Constitution (as amended) [7].

Also, in *Futo Owerri v Amcon* [8] it was clarified that "the exclusive jurisdiction of the Federal High Court, is clearly enumerated in Section 251(1) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended). Therefore, the jurisdictional extent of the Federal High Court does not extend to simple contracts or tort [9]. However, the Federal High Court, has the additional jurisdiction to entertain and determine any other matter as may "in addition be conferred on it, by an Act of the National Assembly." One of such Acts of the National Assembly is the Asset Management Corporation of Nigeria (AMCON) Act, Cap A24 A, 2010, (as amended). Section 53 of the aforementioned AMCON Act, donated the requisite jurisdiction of the Federal High Court to hear and determine matters relating to debt recovery, as shown in paragraph 28 of the 1st Respondent's statement of claim. For the purpose of the instant case, the objectives of the third party Rule/Proceedings were activated, in order to prevent multiplicity of actions and to enable the Court to settle the disputes between all the parties connected to the dispute, that is, the plaintiff, defendant(s) and the third party. This is to prevent the subject matter of the claim from being tried twice. See *Bank of Ireland v. Union Bank of Nigeria Limited & Anor* [10].

2. Debt Recovery Processes

It is a known fact that any judgment obtained from a court will be unproductive without the means of enforcing the judgment. Consequently, the major ways of executing a judgment in relation to debt recovery are:

- Writ of Fife
- Attachment and Sale of Immovable Property
- Writ against goods and chattel
- Writ of Sequestration Garnishee Proceedings
- Winding Up Proceedings

i. Writ of Fife

This is also known as Writ of Fieri Facias and it is the most popular form of enforcement of payment of judgment debts. However, the effect of this writ is the attachment and sale of the judgment debtor's property to realize the judgment debt. Furthermore, in a situation where a court has made an order for payment of the judgment debt by installments, then the order

⁷ *Per Obaseki-Adejumo, JCA (Pp. 15-19, paras. B-C)*

⁸ (2019) LPELR-47327

⁹ *Opia V. Independent National Electoral Commission & Anor* (2014) LPELR-22185 (SC); *Odutola V. University of Ilorin* 18 NWLR (Pt 1156) 563 et 462.

¹⁰ (1998) LPELR-744 (SC) page 16, paragraphs B-C. *Per Yakubu, JCA (Pp. 40-41, paras. E-F)*

operates as a stay of execution of the judgment and afterward the writ may be issued only for the amount of installments which have become due on such default.

ii. The Effect of Writ of Fife

This process of execution of judgment binds the property in the hands of the execution debtor, starting from the time the writ is delivered to the sheriffs for execution and when it will be the duty of the security without fee, as at the time of receiving such writ and to endorse on the back of the writ the hour, day, month and year when he received the writ. A Writ of Fife is issued on an application of the judgment creditor or his lawyer by filing of a precipe in the prescribed form and this will be accurately completed and all the fees will be paid.

iii. Writ against goods and chattel

This is the duty of the Sheriff, who has the deputy sheriff and the Bailiffs to support him. The Legal officer carries out seizing and sale of the goods. However, the Legal officer is the agent of the Sheriff and not the execution creditor. Also, the registrar will forward the writ to the Sheriff or Deputy Sheriff of the area where the execution will take place

iv. Sale of Attached Moveable Property

In this case, the sale of the debtor's properties will be by public auction except where on application, the court may order private sale of the goods. However, private selling without leave of court but with the agreement of the debtor remains legitimate. However, on application, the court may set it aside. More so, no goods seized in execution under process of a court must be sold because of satisfying the writ of execution until the expiration of a period of at least five days after the goods have been seized except the goods are perishable in nature or the owner of the goods that is being seized makes such requests in writing.

v. Writ of Sequestration

A writ of sequestration is directed against the property of the judgment debtor in relation to both movable and immovable property. It results in vesting all the property in the possession of the sheriff and this prevents the debtor from making use of the property. If the property is merchandise, the debtors cannot sell and if it is housing property, the debtor cannot enter them or receive any rents or profit due to him on the property. However, order 11 of 9 Judgment Enforcement makes a provision that "a writ of sequestration shall be directed to two or more commissioners to be appointed by the court. Thus, they shall be commanded and given authority to enter upon all the immovable property of the person against which the writ has been issued.

b. The Effect of Writ of Sequestration:

This writ binds real property and personal property in possession from the time it is issued. Furthermore, where sequestration of a debtor's assets

has been ordered, whoever knowingly takes any action that tends to prevent the sequestrator from carrying out his duty will be obstructing a court order and therefore technically in disrespect of the court.

vi. Garnishee Proceedings

This is a mode of execution in which a debt that is due to the judgment debtor from another person is attached by the judgment creditor in order to satisfy the judgment debt and costs. Furthermore, this is a useful attachment of the debtor's effects in the garnishee's hands and is a form of execution of a judgment which is given by the court against the debtor. More so, the parties to the garnishee proceedings are: Judgment debtor, Judgment creditor and debtor to the judgment debtor.

3. Winding up Proceedings

This is a statutory process of dissolution of a company. It is a process whereby the operations of a company are brought to an end and its assets are sold and the proceeds will be distributed amongst creditors and others so entitled e.g. those whom the company is owing.

4. Enforcement of Foreign Judgments

Foreign judgments, may in certain cases, be recognized and enforced in Nigeria and judgment in Nigeria can also be enforced in other countries. The Act that makes provision for the enforcement of foreign judgments in Nigeria is the Foreign Judgments (Reciprocal Enforcement) Act [11] 2004. Therefore, under this Act, a judgment which is obtained in a superior court of any foreign country and satisfies the requirements of Section 3 (1) of the Act shall be enforced in Nigeria, according to Reciprocal Enforcement of Judgment Act, 2004. This Act also provides for registration of judgment of superior courts of foreign countries, which gives reciprocal treatment to judgments of Nigerian High Courts and to which the provision of the Act has been extended.

Section 9 (2) of the Administration Act 1920 specifies certain limits on the judgment to be registered which provides that no judgment will be registered if:-

- The original court acted without jurisdiction
- The judgment was obtained by fraud
- The judgment was in respect of a course of action, which for reasons of public policy or some other similar rule could not have been accepted by the registering court etc.

5. Time within which to apply for registration of judgment

Section 3(1) of the UK Ordinance provides that where a judgment has been obtained in the High Court in England or Ireland, or in the Court of Session in Scotland, the judgment creditor may apply to a High

¹¹ Cap. F35 LFN 2004

Court at any time within twelve (12) months after the date of the judgment, or such longer period as may be allowed by the court, to have the judgment registered. Based on this provision, Nigerian courts have, in a long line of cases, held that any application for registration in Nigeria of a judgment obtained in a High Court in England must be registered within a period of twelve months from the date the judgment was made otherwise such an application would be held to be time barred and rejected. Although the provision suggests that the court could extend the time within which a judgment creditor may apply to register a judgment, there seems to be no case where the court has actually exercised that jurisdiction. Under Nigerian law, an application for extension of time within which to register a judgment outside the period statutorily provided would involve the exercise of the judge's discretionary power which is required to be exercised judicially judiciously and having regard to the entire circumstances of/ the matter.

6. Ordinance Applicable to Money Judgment

It is notable that only a judgment to which the Ordinance applies is relevant for this provision. Thus, any judgment or order given or made by a court in any civil proceedings, whether before or after the commencement of the Ordinance, whereby any sum of money is made payable, and includes an award in proceedings or in an arbitration if the award has, in pursuance of the law in force in the place where it was made, become enforceable in the same manner as a judgment given by the court in that place. In order for an arbitral award to be elevated to the status of a judgment which can be registered and enforced under the Ordinance, the award debtor is required to have applied and obtained leave of the court in the country where the award was made to enforce the award in the same manner as a judgment of that court.

7. Grounds for Refusing Registration of Judgment under the Ordinance

Section 3(2) of the Ordinance provides that no judgment shall be ordered to be registered if any of the following grounds exists:

- (a) The original court acted without jurisdiction
- (b) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the original court, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of that court
- (c) The judgment debtor, being the defendant in the proceedings, was not duly served with the process of the original court, and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court
- (d) The judgment was obtained by fraud
- (e) The judgment debtor satisfies the registering court either that an appeal is pending, or that

he is entitled and intends to appeal against the judgment

- (f) The judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering court.

The unfortunate consequence of the provision of section 3(2)(b) of the Foreign Judgments Enforcement Act is that if the defendant is not ordinarily resident or carrying on business within the jurisdiction of the original court and did not previously agree to submit to the jurisdiction of the foreign court, he could simply ignore the proceedings against him even if duly served with the court documents and any judgment entered against him would be unenforceable on the ground that he did not submit to the jurisdiction of the court. This was the scenario in the case of *Grosvenor Casinos Ltd v. Ghassan Haloui* [¹²] where the judgment debtor, who was not ordinarily resident in the United Kingdom, was duly served with all the court processes in Nigeria but he simply ignored them and never submitted to the jurisdiction of the English court. He successfully set aside the registration of the judgment against him based on this provision. However, the Supreme Court has criticized the provision and called for its amendment. The Court held that "it is particularly alarming that when in a case like this, a person ordinarily resident in Nigeria obtains credit in England and in satisfaction issues a cheque which is later dishonoured, the judgment obtained against him cannot be enforced in Nigeria. Under the said section 3(2)(b) above, the judgment of a court in England cannot be enforced in Nigeria on the ground that a defendant has not submitted to the jurisdiction of the English Court. Consequently, there is an urgent need to reform our law on this area for better integrity in commercial obligations.

8. Enforcement of Foreign Judgment under the Act

Section 3(1) of the English Act provides as follows:

"(1) The Minister of Justice, if he is satisfied with the benefits conferred by this Part of this Act being extended to judgments given in the superior courts of any foreign country, substantial reciprocity of treatment will be assured as respects the enforcement in that foreign country of judgments given in the superior courts in Nigeria may by order direct- (a) that this Part of this Act shall extend to that foreign country; and (b) that such courts of that foreign country as are specified in the order shall be deemed superior courts of that country for the purposes of this Part of this Act.

9. Time for Registration of judgment under the Act

Section 4(1) of the English Act provides that "a person being a judgment creditor under a judgment to which this Part of this Act applies, may apply to a superior court in Nigeria at any time within six years

¹² (2009) LPELR – 1340 (SC)

after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in those proceedings, to have the judgment registered in such court, and on any such application the court shall, subject to proof of the prescribed matters and to the provisions of this Act, order the judgment to be registered.” Till date, there is no evidence that the Minister of Justice has exercised the powers under section 3 of the Act to extend Part 1 of the Act to any country and, consequently, the provision of section 4 of the Act remains inchoate.

However, section 10(a) of the Act provides: “Notwithstanding any other provision of this Act:

- (a) A Judgment given before the commencement of an order under section 3 of this Act applying Part I of this Act to the foreign country where the judgment was given may be registered within twelve months from the date of the judgment or such longer period as may be allowed by a superior court in Nigeria; and
- (b) Any judgment registered under the Reciprocal Enforcement of Judgments Ordinance at the time of the coming into operation of an order made under section 3 of this Act in respect of the foreign country where judgment was given shall be treated as if registered under this Act and compliance of rules applicable to the former Act shall satisfy the requirement of rules made under this Act”.

In the case of *Macaulay v. R. Z. B Austria* [¹³], where the issue was the time within which to register an English judgment, the Supreme Court held that the applicable law was the Ordinance and that the judgment ought to have been registered within a period of twelve months. The court, however, considered the effect of section 10(a) of the Act and held that “...since the Minister of Justice had not yet exercised his power under section 3 of the [Act] extending the application of Part 1 of the Act to the United Kingdom where the judgment in question was given, then section 10(a) of the said Act can also apply.” The Court further held as follows:

“By this provision, irrespective, regardless or in spite of any other provision in the 1990 Act, any judgment of a foreign country including United Kingdom to which Part I of that Act was not extended, can only be registered within 12 months from the date of the judgment or any longer period allowed by the court registering the judgment since the provisions of Part I of the said Act had not been extended to it. Section 4 of the 1990 Act which speaks of registering a judgment within 6 years after the date of judgment only applies to the countries where Part I of the said Act was

extended, that is to say, when the Minister made an order under the 1990 Act; and in this case it was not”

10. Recovering the judgment sum in Foreign Currency

Section 4(3) of the Act provides that, where the sum payable under a judgment is expressed in a currency other than the currency of Nigeria, the judgment shall be registered as if it were a judgment for such sum in the currency of Nigeria as, on the basis of the rate of exchange prevailing at the date of the judgment of the original court, is equivalent to the sum payable. It is to be noted, however, that section 4(3) is under Part 1 of the Act which requires the Minister’s order to come into effect and since the Minister has yet to issue an order extending Part 1 of the Act to any country section 4(3) also remains inchoate. What this means, therefore, is that until the Minister makes an Order under section 3 of the Act, any judgment registered under section 10(a) of the Act can be recovered in the currency of the judgment.

11. CONCLUSIONS AND RECOMMENDATIONS

- I. The Constitution of the Federal Republic of Nigeria is not explicit as to the jurisdiction over ancillary matters involved in debt recovery matters. Clarification of this matter will enhance commercial integrity of Courts in the adjudication of debt recovery matters.
- II. It is salutary that the Constitution has wisely put debt recovery matters on High Courts as lower courts do not currently have the requisite specialized background and expertise in economic, and finance required to distill and adjudicate on debt recovery matters.
- III. This area of law requires specialized training of lawyers, particularly insolvency lawyers, and the staff of regulatory agencies.

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¹³ SC 109/2002. [2005] 10(12 December 2003)