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A Critical Analysis of Garnishee Proceedings in Nigeria[1]

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Abstract

Garnishee proceeding is a post judgment procedure initiated by a judgment creditor against a judgment debtor for a judgment sum. It is a legal process of enforcing a money judgment by the seizure or attachment of the debts due or accruing to the debtor which form part of his property available in execution of a judgment. Garnishee proceeding is a specie of judgment execution of debt for which the ordinary methods of execution are not applicable. The proceeding is governed principally by the Sheriffs and Civil Process Act. Applications for garnishee proceedings are made principally under the Sheriffs and Civil Processes Act. Applications for garnishee proceedings are made to the court by the Judgment Creditor (without joining the judgment debtor as a party). That is to say, the originating applications in a garnishee proceeding is made ex parte. The order the court makes upon the application usually comes in two stages: order nisi and order absolute. Section 84 of the Sheriffs and Civil Processes Act provides for the consent of the Attorney General of the Federation or the government. This research adopts the doctrinal approach in the analysis of relevant materials including but not limited to Sheriffs and Civil Process Act, some Rules of court, decided cases, etc, all, with a definite intention of achieving the aforesaid aims and objectives. This study also sought to determine what the constitutionality of section 84 of the Sheriffs and Civil Processes Act entails? What is the legal rationale for denying the individual judgment debtor the right to fair hearing before a garnishee order nisi is made but the same right is given to the government is? This is a legal concern which this research addresses: that section 84 of the Sheriffs and Civil Processes Act is unconstitutional and should be amended, in the spirit of the fundamental human right to fair hearing in a garnishee proceeding, and to abolish the issue of consent of the Attorney General before a garnishee order nisi is made against the State or Federal Governments. The study thus recommends that, a proviso should be made to section 85 of the Sheriff and Civil Processes Act to the effect that only the judgment sum shall be attached upon the service of the order nisi on the garnishee, and that where the judgment debtor has more money than the judgment sum, he shall be entitled to withdraw such money above the judgment sum.

Keywords: ***Garnishee, Execution, Judgment, Debt, Creditor, Debtor***

1. Introduction

Garnishee proceeding is a post judgment procedure initiated by a judgment creditor against a judgment debtor for a judgment sum. It is a legal process of enforcing a money judgment by the seizure or attachment of the debts due or accruing to the debtor which form part of his property available in execution of a judgment. Garnishee proceeding is a specie of judgment execution of

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debt for which the ordinary methods of execution are not applicable. The proceeding is governed by the Sheriffs and Civil Processes Act. Applicati.ons for garnishee proceedings are made to the court by the judgment creditor (without joining the judgment debtor as a party): that is to say the originating application in a garnishee proceeding is made ex parte. The order the court makes upon the application usually comes in two stages: order mist and other absolute. The word *nisi* is a Norman-French word which means "unless". It is the first order the court makes upon an ex parte application in a garnishee proceeding; it is an order made at that stage, that the sum covered by the application be paid into the court or to the judgment creditor within a stated time unless there are some sufficient reasons why the party on whom the order is directed (that is, the holder of the judgement debtor's account) has given why the garnishee order *nisi* is made absolute and the holder of the judgment debtor's money shall be liable to pay the judgment sum specified in the garnishee order absolute.

Garnishee proceedings have some inherent defects. For instance, a judgement debtor whose money is to be deducted to offset a judgment sum is not a party at all in the proceedings and the individual judgment debtor's consent is not required in law before his or her account is attached by a garnishee order *nisi*, but in the case of a judgment sum belonging to the Federal or State government under the control or custody of a public officer in his official capacity, the order *nisi* shall not be made at all unless the consent of the Attorney General of the Federation or the Attorney General of the State (as the case may be) if first obtained. Section 84 of the Sheriffs and Civil Processes Act provides for the consent of the Attorney General of the federation or the Attorney General of the State in a garnishee proceeding involving a judgment sum belonging to the government. What is the constitutionality of that section 84 of the Sheriffs and Civil Processes Act? What is the legal rationale for denying the individual judgment debtor the right to fair hearing before a garnishee order *nisi* is made but the same right is given to the government? This is a legal concern which this research addresses.

2. Overview of Garnishee Proceedings in Nigeria

The procedure for enforcing a judgment (money judgment) by garnishee proceedings in Nigeria is provided for by the SCPA. Specifically, by Section 83 of the SCPA, garnishee proceedings are initiated when a judgment creditor brings an ex parte application before the court for an order nisi [2]directing any other person who is indebted to the judgment debtor (referred to as the 'garnishee'), to appear before the court to show cause why he should not be made to pay to the judgment creditor the debt due from him (the garnishee) to the judgment debtor, in satisfaction of the judgment sum. In other words, where A owes B money and C gets a judgment against B for a certain sum, C can seek an order from the court to have A pay to him, in satisfaction of B's judgment debt, the money A owes B or holds on behalf of B.

The affidavit filed in support of the ex parte application must state that judgment has been obtained, that the judgment sum is still unsatisfied, specify the unsatisfied amount, and that another person within the jurisdiction of the court is indebted to the judgment debtor. The language of section 83 of the SCPA clearly defines a garnishee as a debtor to the judgment debtor. In describing what must be contained in the application for the order nisi, the section states:

> *"…and upon affidavit by the applicant or his legal practitioner…. that any other person is indebted to such debtor and is within the State, order that such debts owing from such third*

[2] An order nisi is a court's order that will become absolute (final) unless the adversely affected party shows the court, within a specified time, why it should be set aside.

> *person, hereinafter called the garnishee, to such debtor shall be attached to satisfy the judgment or order, together with the costs of the garnishee proceedings and by the same or any subsequent order it may be ordered that the garnishee shall appear before the court to show cause why he should not pay to the person who has obtained such judgment or order the debt due from him to such debtor or so much thereof as may be sufficient to satisfy the judgment or order together with costs aforesaid."*

By the wordings of section 83, it is clear that the law envisages a situation where the judgment creditor already has information that the named garnishee is indeed indebted to the judgment debtor before an application for the order nisi is made to the court.

Upon the grant of the order nisi, the law requires that the order nisi must be served on the garnishee and the judgment debtor at least 14 days before the next hearing[3]. Thus, the garnishee must have at least 14 days from the date of service of the order nisi, to the day of the hearing to show cause. The purpose of the hearing to show cause is to give the garnishee opportunity to show reasons, if any, why the garnishee order nisi should not be made absolute i.e. why the garnishee should not be made to pay the judgment debt to the judgment creditor. However, the service of the order nisi immediately binds the debt in the garnishee's hands until the court gives directives. Any alienation of the debt after attachment without the leave of court is considered a violation of the order nisi and, in most circumstances, attracts punishment from the court.

It is worth noting that the SCPA does not set out the particular form or manner in which the garnishee is to show cause. However, as the courts are guided by records, this is usually done by filing an affidavit and the courts have approved this practice over the years[4]. In showing cause why it should not be made to pay the judgment creditor, the garnishee may dispute its indebtedness to the judgment debtor, in which case, the court may order that the issue be tried or determined. The garnishee may also show that the debt sought to be attached belongs to someone else or that someone else has a lien or charge upon it[5].

Failure to file an affidavit to show cause by the return date for hearing may result in the order nisi being made absolute against the garnishee. At the same time, if the garnishee does not appear on the day of hearing, the court upon satisfying itself that the garnishee was served with the order nisi and that there is proof of service of the hearing date, may grant an order absolute against the garnishee either to the tune of the judgment debt or any part of it as may be sufficient to satisfy the judgment or order, together with the costs of the garnishee proceedings.

In all, a garnishee will be discharged from the garnishee proceedings if:

A. it does not dispute the debt; in which case the order nisi is made absolute and the garnishee proceeds to pay the judgment creditor, or

B. it successfully shows cause why it should not be made to make any payment to the judgment creditor.

[3] Sheriff and Civil Process Act, 2004, s 83(2).

[4] *Nigerian Agip Oil Company Ltd v Peter Ogini & Ors* (2010) 2 NWLR (Pt. 1230) 131; see *also Nigerian Breweries Plc v Dumuje* (2016) 8 NLWR (Pt. 1515) 536.

[5] Sheriffs and Civil Process Act, 1990, ss 87 and 88.

The prevailing practice in garnishee proceedings in Nigeria is for the judgment creditor to proceed against banks (as garnishees) without necessarily verifying the indebtedness of the bank to the judgment debtor. However, the SCPA stipulates that the garnishees ought to be persons that are indebted to the judgment debtor. The implicit requirement in that provision is that the judgment creditor ought to carry out thorough investigations to determine the actual debtors to the judgment debtor. It is therefore expected that an ex parte application for a garnishee order nisi directed against any bank as garnishee must at least clearly set out the proof of indebtedness from the garnishee to the judgment debtor or good reason for believing that the bank is indebted to the judgment debtor. For example, in the State of Michigan in the United States of America, a judgment creditor who wishes to 'garnish' a bank is required to include the judgment debtor's account numbers with the bank in the application form[6]. Therefore, in order for such a creditor to obtain the garnishee order, he must have already identified the relevant bank and acquired the judgment debtor's account number. In Nigeria however, it is common to see judgment creditors name as many banks as possible (sometimes all banks) in a fishing expedition, without bothering to investigate whether the judgment debtor maintains any account with these banks or providing any basis for naming the banks as garnishees. Some have argued in favour of this approach because in the absence of a court order, banks will not disclose their customer's details to a judgment creditor because of the duty of confidentiality they owe their customers and such disclosure may amount to a breach of that duty. The resulting effect however is that banks find themselves continuously bearing unnecessary costs where they are named in garnishee proceedings but do not maintain any account for the judgment debtors.

3. Critical Analysis of Some Sections of the Sheriffs and Civil Process Act as Touching Garnishee Proceedings

Here, the work critically examines Garnishee Proceedings and analyses the relevant sections of the Act that touch on garnishee proceeding. It deliberately looks away from section 19 of the Act because it is basically definitive plus the fact that basic definitions have been taken care of in earlier chapters of this work. Therefore, this chapter centres on sections 83 – 92 of the Act.

3.1 Parties to Garnishee Proceedings

The principal parties are the Judgement Creditor/Applicant and the Garnishee/ Respondent. The Judgment Creditor/Applicant is the person in whose favour the judgment of the court was given and the person entitled to the judgment sum; the garnishee is the party (mostly a bank, employer, etc) having the custody of the judgment debtor's money and who at the instance of the judgment creditor is being called upon to pay the judgment debt from the judgment debtor's account to the judgment creditor[7].

Strictly speaking, the judgment debtor is not a party to garnishee proceedings[8].This is notwithstanding the fact that the judgment debtor was a party to the suit from which the judgment debt was awarded in favour of the judgment creditor. A handful of legal arguments have over the years been proffered to support the assertion that the judgment debtor is not a party to garnishee proceedings. One of such arguments is the fact that in garnishee proceedings, the judgment debtor has no role assigned to him by law. Indeed, a careful reading of Section 83 to 92 of the Sheriffs

[6] "Getting a Garnishment' 6 Michigan Legal Help, Michigan State Bar Foundation, https://michiganlegalhelp.org /self-help-tools/moneyand-debt/getting-garnishment. Accessed on 16-08-22.

[7] *Standard Trust Bank Ltd v Contract Resources Nig. Ltd* (2001) 6 NWLR (Pt. 703) 115 at 123.

[8] *Nigeria Telecommunications Plc v. I.C.I.C Ltd* (2009) 16 NWLR (Pt. 1167) at 387.

and Civil Process Act[9], Order (VIII) of the judgments (Enforcement) Rules and Order 37 of the Federal High Court (Civil Procedure) Rules leave no one in doubt that no specific role has been given to the judgment debtor in Garnishee proceedings[10]. It is only in Section 83 (2) of the Sheriffs and Civil Process Act that it has been provided that, at least fourteen days before the day of hearing, a copy of the order *nisi* must be served upon the judgment debtor. This however does not make the judgment debtor, a necessary party to garnishee proceedings.

In garnishee proceedings, it is not the judgment debtor that is summoned or called upon by the court to show cause why the judgment sum should not be given paid over to the judgment creditor in satisfaction of the judgment debt. It is the garnishee (the third party) that is summoned. This is based on Section 83(1) of the Sheriffs and Civil Process Act [11]which in variable strengthens the view that garnishee proceedings being proceedings *sui generis*, is principally between the judgment creditor and the garnishee.

In *United Bank for Africa Plc v. Hon. Iboro Ekanem,* the court addressed the issue whether a judgment debtor is a party to garnishee proceedings[12]. The court said:

A careful reading of the provisions of Sections 83(1) and (2), 85, 86, 87 and 90 of the Sheriffs and Civil Process Act, clearly reveal that the judgment debtor has more or less no role to play in garnishee proceedings. A judgment debtor is merely a nominal party whose money in the custody of the garnishee is being recovered by the judgment creditor in satisfaction of the judgment debt owing to the judgment creditor. The judgment debtor is not the one requested to appear before the court to show cause why the order *nisi* should not be made absolute. It is only the garnishee, in this case Guarantee Trust Bank Plc, which is expected to inform the court if there is any third party(s) interest in the judgment debtor's money in its custody. It is only the garnishee that is expected to react if he is dissatisfied with the order nisi to apply to the court by stating reasons why the order nisi should not be made absolute, but certainly not the judgment debtor.

Also, in *Nigerian Telecommunication Plc v. I.C.I.C. (Directory Publishers) Ltd* [13]it was held that a garnishee proceeding is strictly between the judgment creditor and the third party (garnishee) who is indebted to the judgment debtor. The same position was maintained by the court in the case of *Pipeline & Product Marketing Company Ltd v. Delphi Petroleum*[14]to the effect that garnishee proceedings, although incidental to the judgment pronouncing the debt owing, the judgment debtor is not a necessary party to the said proceedings [15].

However, in practice, the courts would ordinarily not close its eyes to any processes filed by the judgment debtor in the course of the garnishee proceedings[16]. The issue would then turn to the weight to be attached to such process filed by the judgment debtor. Moreover, though not a necessary party, Section 83(2) of the Sheriffs and Civil Process Act provides that the judgment debtor must be served with a copy of the garnishee *order nisi* at least fourteen days before hearing.

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[9]Laws of the Federation of Nigeria, 2004, Cap 56, /vol.14.
[10]2009.
[11](n8) P8.
[12](2010) 6 NWLR (PT/ 1190) 207 at 227.
[13](2009) 16 NWLR (Pt. 1167) 36 at 387 *para* H.
[14](2005) 8 NWLR (pt. 928) 454, paras. D – E.
[15]*Nigerian Maritime Administration and Safety Agency v Stephe Odey* (2012) 53 WRN 108.
[16]*Cross River State Forestry Commission v. Marine Effong Anwan* (2012) 40 WRN 175.

In view of this provision, the judgment debtor can be heard by the court. It should be noted that failure to serve the judgment debtor the *order nisi* renders the entire garnishee proceedings a nullity[17].

The above case law authorities notwithstanding, the researcher humbly submits that the Judgment Debtor should be at least a nominal party if not a necessary party because the money, which has become a judgment sum, is at stake.

3.2 Garnishee Proceedings and Other Forms of Judgment Execution

Garnishee proceedings are *sui generis* (i.e proceedings of their own kind) and therefore, different from all other forms of execution of judgment. It is however not uncommon to observe in courts, arguments proffered by lawyers which tend to equate garnishee proceedings for the reason that, there is a motion for stay of execution of the judgment filed in the trial court of Appeal, if it was refused by the trial court. In proffering such argument, the lawyer to the judgment debtor prays the court simply to halt or dismiss the garnishee proceedings because the judgment debtor has filed a motion for stay of execution.

By section 19 of the Sheriffs and Civil Process Act[18] and other decided cases, there is a clear distinction between execution of judgments and other methods of enforcing judgments such as garnishee proceedings. The underlying distinction between garnishee proceedings and other forms of execution of judgments was drawn by the court in *Purification Techniques Ltd v. Attorney General of Lagos State*[19]as follows:

Execution of judgment entails the seizure and sale of chattels of the Judgment debtor under warrant of court. This is different from the attachment of debt owed to a judgment debtor by a third party who is indebted to the judgement debtor. There is a clear distinction between execution of judgments and other methods of enforcing judgments, such as garnishee proceedings. The distinction is brought out by the definition of writ of execution in section 19 of the Sheriffs and civil Process Act, Cap. 407, Law of the Federation 1990. Writ of execution includes writ of attachment and sale, writ of delivery, writ of possession and writ of sequestration. It excludes garnishee proceedings.

Section 19 of the Sheriffs and Civil Process Act provides that 'Writ of execution includes writ of attachment and sale, writ of delivery, writ of sequestration[20].

Under the rules of interpretation of statues, it is the law that *expression uniusest exclusion terius.* That is to say, the express mention of one thing is the exclusion of another[21].Therefore, garnishee proceeding is not among the means of execution of judgment by Writ of Execution.

In the case of *Nigerian Telecommunication Plc v. L.C.I.C (Directory Publishers) Ltd* [22] the court also held thus.

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[17]*Wema Bank Plc v Brasten Steer Nigeria Ltd* (2011) 6 NWLR (Pt. 1242).

[18](n8) P8.
[19](2004). ALL FWLR (Pt. 211) 1479.
[20](n8) P8.
[21]B A Garner, *Black's Law Dictionary*, (9th Edition, West Publishing Company, 2009), page 1830.
[22](2009) 16 NWLR (Pt. 1190) 356, paras. D-E.

There is a distinction between enforcement of judgment by a writ of execution and garnishee proceeding, as made manifest by the exclusion of garnishee proceedings from the definition of writ of execution in section 19 of the Sheriffs and Civil Process Act

In *United Bank for Africa Plc v. Ekanem* [23], the court held that:

It cannot be overemphasized that there is a distinction between the enforcement of a judgment by writ of execution, and by garnishee proceedings.

Consequently, the existence of an application for stay of execution of judgment does not preclude a judgment creditor from seeking to use garnishee proceedings to enforce judgment.

Consequently, the existence of an application for stay of execution of judgment does not preclude a judgment creditor from seeking to use garnishee proceedings to enforce judgment.

Moreover, in the earlier cited classical case of *Purification Techniques Ltd v. Attorney General of Lagos State*[24], It was held by the court that:

Given the distinction that exists between execution and garnishee proceedings for the enforcement of judgment, the existence of an application seeking for an order staying execution of a judgment does not preclude a judgment creditor from seeking to use some other legal methods to enforce judgment.

The above authorities set out the differences between proceedings and other forms of judgment enforcement procedures.

3.3 Objectives and Defences in Garnishee Proceedings

There are some objections the garnishee may raise in a proceeding. These objections depend on the facts circumstances of each use. Upon being served with garnishee order nisi, it behoves the garnishee in particular to show cause why it should not be ordered to justify the judgment debt by praying the judgment debtor's money in its possession to judgement creditor. That is to say, the garnishee is called upon to show cause why the order nisi should not be made absolute. In reaction to the summons of court, the garnishee is expected to either pay the money as ordered or show because money should not be paid. This could be a way of objection to the proceedings. The garnishee could also raise and rely on some defence available to her. These defences are discussed below.

3.3.1 When the Garnishee Resides Outside Jurisdiction.

Section 83 (1) of the Sheriffs and Civil Process Act is unequivocal in its provision that garnishee proceeding can only be commenced and prosecuted against a garnishee that is indebted to the judgement creditor and is within the state, that is to say, the garnishee must be a person who is resident within the jurisdiction of the court. The said section 83 (l) provides that the court, may, upon the ex parte application of any person who is entitled to the benefit of a judgement for the debtor liable under such judgement and upon affidavit by the applicant or his legal practitioner that judgement has been recovered and that it is 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 judgement

[23](2010) 6 NWLR (Pt. 1190) 207 at 227.

[24](n13)Ration 6.

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 judgement or order the due from him to such debtor or so much thereof as may be sufficient to satisfy the judgement or order together with costs aforesaid[25].

Therefore, where a garnishee proceeding is taken against a garnishee who is not resident in anyway whatsoever within the State from which the order nisi was issued, such proceedings is by section 83 (l) of the act, incompetent and liable to be struck out.

To clearly illustrate the above ground of defence: a bank or any other corporate entity in Lagos State, Nigeria, cannot be compelled by an order nisi issued by a court in Akwa Ibom State to appear in Akwa Ibom State and show cause why the order nisi should not be made absolute, if such bank or cooperate entity has no physical presence in Akwa Ibom state. Such order, will by section 83(I) of the Act be incompetent, ultra vires and liable to be struck out.

However, taking the commercial banks in Nigeria as a case study, it can safely be said that virtually all the major commercial banks in Nigeria have their branches in all the states of the Federation and therefore garnishee proceedings can rightly be taken and orders issued from any State against such banks.

On receipt of the order nisi from any court, the garnishee should first ask and answer the question whether she has any physical presence in the state from, which the order nisi was issued. If she has none, then the stage is set for an objection to the garnishee proceedings.

Notwithstanding the intended objection however, the garnishee should appear in court from wherever she is resident and inform the court that the order nisi should not made absolute against her on the ground that she is not resident within the jurisdiction of the court.

In garnishee proceedings, unlike other civil matters, there is no need to apply for leave of court to serve the garnishee with the processes of court out of jurisdiction. By section 83(1) of the Act, the garnishee must be within jurisdiction and if she is within jurisdiction there is no need for her to leave to serve jurisdiction." Therefore, the practice of approaching the court for leave to serve the garnishee processes on the garnishee out of jurisdiction is a faulty practice and such should be refused by our courts.

However, temporary physical presence of the garnishee within jurisdiction at the time of issuance of the order nisi will suffice. It is therefore immaterial that the garnishee has packed out of jurisdiction after the issuance and service and of the order nisi on her.

3.3.2 Improper Service of Garnishee Process on the Garnishee

Service of court process is an issue of jurisdiction which goes to the root of the matter before the court. Therefore, without proper service in the way and manner prescribed by law or rules of court, the court would lack the jurisdiction to adjudicate on the matter. It is the law that jurisdiction is the threshold and livewire that determine the authority of a court of law or tribunal to entertain a case before it. This is absolutely so because it is only when a court is imbued or conferred with the necessary jurisdiction that it will have the judicial power and authority to entertain, hear, and

[25] Sheriffs and Civil Processes Act, Cap S 6, LFN 2004, s 83.

adjudicate upon any cause or matter brought before it parties. Therefore, the absence of such requisite jurisdiction would render any proceeding conducted by the court null and void, no matter how well conducted.

In most garnishee proceedings, the garnishee is usually a corporate person. It could be a commercial bank, a mortgage bank or the Central Bank. It could also be a company not engaged in banking. In such cases, the garnishee must be personally served with the originating process of the court such as the garnishee order nisi, in the way and manner prescribed by the law and the rules of court. By section 78 of the Companies and Allied Matters Act, 2004 a court process (such as a garnishee order) shall be served on a company in the manner provided by the rules of court. Order 7, Rule 9 of the Lagos State High Court (Civil Procedure) Rules, 2012 provides the manner of service on a company. It provides that subject to any statutory provision regulating service on a registered company, corporation or body corporate, very originating process or other process requiring personal service may be served on the organisation by delivery to a director, secretary, trustee or other senior or principal officer of the organisation or by leaving it at the registered, principal or advertised office or place of business of the organisation within the jurisdiction[26]**.**

The provision of the law therefore makes it imperative for originating processes of court (such as garnishee order nisi) to be served on the garnishee by delivering it personally to the company through its senior or principal officers the company's registered, principal or advertised place of business. Failure to comply with the above renders the proceedings null and void.

Therefore, improper service of order nisi is a good ground for counsel to the garnishee to raise objection to the proceedings and pray the court and the order nisi should not be made absolute for the reason that proper service was not effected on the garnishee.

3.3.3 Non- Service of Order Nisi on the Judgement Debtor

Section 83(2) of the Sheriffs and civil Process act provides that "At least fourteen (14) days before the day of hearing, a copy of the order nisi shall be served upon the garnishee and on the judgment debtor. "Where the garnishee order nisi is only served on the garnishee without also serving same on the judgment debtor, an objection can rightly be raised as to the competency of any further step(s) in the proceedings. Indeed, the garnishee can object to the making of the garnishee nisi absolute for the reason that the order nisi has not been served on the judgment debtor in compliance with section 83(2) of the Act. The section uses the word "shall" which makes such service mandatory. The order nisi must therefore mandatorily be served on the parties at least 14 days before the date for hearing of the application for order absolute. It is immaterial that the judgment debtor is not, strictly speaking, a party to garnishee proceedings. Service on him is mandatory.

In *Wema Bank Plc. v. Brastem-Sierr (Nig). Ltd*[27] the Court held that:

In garnishee proceedings, the service of the order nisi on the judgment debtor is a condition precedent to the jurisdiction of the court to make an order absolute. Failure to serve the court nisi before an order absolute is made is a fundamental omission which renders the proceedings void because the court would have no jurisdiction to entertain the next stage in the garnishee proceedings. In the instant cause, the 2nd respondent as judgment debtor was not served with the order nisi which was mandatory before order absolute was made.

[26]Companies and Allied Matters Act, 2004, Cap C23, LFN, 2004, s 78.

[27](2011) 6 NWLR (Pt. 1242) 58.

> *This was a Fundamental omission which rendered the proceedings void because the court had no jurisdiction to entertain the next stage in the garnishee proceedings.*

In the case of *Cross River State Forestry Commission v. Muri Anwan*[28]. Non-service of the garnishee order nisi on the judgment debtor was the issue of appeal. The Court of Appeal, while emphasizing the importance of service or order nisi, said that:

> *Section 83(2) of the Sheriffs and Civil Process Act provides that the judgement debtor must be served the order nisi. This is a condition precedent to the granting of the order absolute. Failure to serve the judgment debtor the order nisi is a fundamental error that robs the court of the necessary vires to continue with the proceeding. The Federal High Court sitting at Calabar was robbed of jurisdiction when it failed to serve the judgment debtor, the order nisi and went ahead to declare the order absolute. The order absolute made by the court is therefore a nullity.*

Therefore, service of the order nisi on the judgment debtor is mandatory, failure of which raises an objection to the proceedings.

3.3.4 When the Order Nisi is not Based on a Valid and Extant Judgment

By section 83(1) of the Sheriffs and Civil Process Act, a garnishee proceeding can only be predicated on a valid and subsisting judgment of a court of law. Under that section, a garnishee application can only be made by a person who is entitled to the benefit of a judgment for recovery of money.

Consequently, in the absence of a valid and subsisting judgment of a court of competent jurisdiction, objection can be raised to the commencement and prosecution of garnishee proceedings. A party cannot institute garnishee proceedings and pray the court to compel a third party (garnishee) to pay over to him a debt which is owed him by another in the course of his business transaction with that other person except and unless such debt had been pronounced upon by a court of law, indeed, garnishee proceedings are basically between a judgment creditor and the garnishee for the payment or recovery of judgment debt owed the judgment creditor by the judgment debtor.

In the case of *Nigerian Telecommunication Plc v. L.CLC (Directory Publishers) Ltd*[29] the Court held that the law is trite that a garnishee proceeding can only be commenced where a valid judgment had been obtained and same subsists.

The garnishee is therefore in very good position to object to the proceedings in the event that such proceeding is not rooted in a valid and subsisting judgment of a court of law.

3.3.5 Non-Attachment of the Certified True Copy of the Judgment to the Application.

By order VIII (3) of the Judgments (Enforcement) Rules, a judgment creditor who desires to take garnishee proceedings shall file in the court's registry an affidavit and if the garnishee proceeding is taken in a court other than the court in which the judgement was given or made, a certified true copy of the judgement must be attached to the application.

[28](2012) 40 WRN 175.
[29](2009) 16 NWLR (Pt.1167) 357 at 388.

Therefore, an objection would be validly raised to the competency of a garnishee application if the certified copy of the judgement that pronounced the debt owed is not attached to the application where the application is taken in the court other the court that pronounce the debt.

Non-compliance will amount to procedural irregularity and such irregularity is fundamental and fatal in view of the used word "shall" in the provision of other VIII (3)(1)(b) of the judgement (Enforcement) Rules. Such failure on the part of the judgement creditor/ applicant would lead to striking out of the garnishee application.

3.3.6 When the Consent of the Attorney General was not Obtained

We have discussed extensively the issue of Attorney General's consent in the preceeding chapter. Therefore, under this sub-heading, we shall mention only the relevant laws without excavating further details in other to avoid unnecessary repetition.

By the of section 84 of the sheriffs and Civil Process Act, where money liable to be attached by garnishee proceeding is in the custody or under the control of a public officer in his official capacity, the order nisi shall not be made to attach such funds unless the consent for such attachment is first obtained from the Attorney General of the State or of the Federation as the case may be.

Where the money is in the custody and control of a public officer in his official capacity, failure on the part of the judgement creditor/applicant to obtain the consent of the Attorney General before commencing garnishee proceeding against the government renders the proceeding incompetent and liable to be struck out. Notice should be taken of the use of the word "shall" in section 84 which makes it mandatory to first obtain the consent of the Attorney General before commencement of garnishee proceeding against the government in the event that the money sought to be garnished is in the custody or control of a pubic officer in his official capacity. Such failure or omission is therefore a serious ground for objection to garnishee proceedings.

However, by the principle of law enunciated in the case of *Purification Techniques (Nig):Ltd. v. Attorney General of Lagos State*[30], monies standing in government's account in a bank are not in custody or control of a public officer in the public service of the government and therefore the consent of the attorney General is not required before commencement of garnishee proceedings against the government. In that case, the court held that:

> *Given the nature of the relationship between banker and customer, and of the contact that exists between them, the customer has neither the "custody" nor the "control" of monies standing in his credit in an account with the banker. What the customer processes is a contractual right to demand payment of such monies. Monies in the hands of the garnishee banker are not "in custody" or "under control" of the judgment debtor customer. Such monies remain the property in the custody and control of the banker and payable to the judgment debtor until a demand is made.*

In the light of the above, an objection raised to a garnishee proceeding on the ground that the consent of the Attorney General has not been sought and obtained before commencement of garnishee proceeding against the state, will hold no water if the money in issue is money in

[30](2004) All FWLR (Pt. 211) 1479.

government's account in a bank. This is because, in such situation, the money the bank is in custody and control of the bank and not in the custody and control of a public officer in his official capacity. Hence, the consent of the Attorney General is in the eyes of the law, not required where the money sought to be garnished is in the account of government in the bank. It is immaterial that the Attorney General and Accountant General are signatories to such account.

3.3.7 When there is a Pending Appeal against the Judgment

As a general rule, an appeal on its own does not stop or preclude garnishee proceedings. This is because a garnishee proceeding is a separate and distinct proceeding even though it flows from the judgment that pronounced the debt owed. Therefore, commencing garnishee proceedings while there is a pending appeal at the Court of Appeal is not an abuse of court process and therefore, such garnishee proceeding is valid and competent.

However, in the case of *Honourable Justice Denton-West v. Chief Muoma, SAN*[31] the Court of Appeal preferred the view that once an appeal has been entered at the Court of Appeal against the judgment that pronounced the debt owing, garnishee proceedings should not be commenced at the lower court to attach or garnish the judgment debt. That, if a garnishee proceeding was already commenced, such proceeding should be stayed pending the hearing and determination of the appeal. This reasoning was informed by the provision of Order 4, Rule 11 of the Court of Appeal Rules 2007 (still Order 4, Rule 11 of the Court of Appeal Rules, 2011).That Order provides that after an appeal has been entered and until it has been finally disposed of, this court shall be seized of the whole of the proceedings as between the parties thereto and ... every application therein shall be made to this Court and not to the court below[32].

With the above in mind, it would be competent to raise objection to the commencement or continuation of garnishee proceedings at the lower court when there is a pending appeal duly entered at the Court of Appeal against the judgment that pronounced the debt owing.

This is to forestall a situation of rendering the judgment of the Court of Appeal a nullity when the appeal is finally decided.

However, this application or objection cannot be gained as a matter of course. There must be sufficient evidence to proof to the court that indeed an appeal has been entered in the eyes of the law against the judgment in issue. Mere filing of the Notice of Appeal at the Court of Appeal does not imply that an appeal has been entered to preclude garnishee proceedings. An appeal is deemed to be entered when the appellate court has received the Record of Appeal.

In the case of *Agu v. Anyalogu*[33] it was held that:

> *The Supreme Court has made the point that filing of an appeal is different from entering of an appeal. An appeal is only entered in the Court of Appeal when the Record of Appeal has been received at the Court of Appeal from the High Court.*

Therefore, a party opposing a garnishee proceeding on the ground that there is an appeal against the judgment that pronounced the debt owing must show convincing proof that the Record of Appeal has been transmitted to the Court of Appeal and that the said court has received same and

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[31](2008) All FWLR (Pt. 433) 1423.
[32]Order 4, Rule 11 of the Court of Appeal Rules, 2007.
[33](2022) 14 NWLR (Pt. 787) 294.

is therefore seized of jurisdiction over the matter. Filing of Notice of Appeal alone does not suffice to stop garnishee proceedings.

4. Conclusion

Garnishee proceeding is a post judgement procedure initiated by a judgment creditor against a judgement debtor for a judgment sum. It is a legal process of enforcing a money judgment by the seizure or attachment of the debt due or accruing to the debtor which form part of his property available in execution of a judgment. Garnishee proceeding is a specie of judgment execution of debt for which the ordinary methods of execution are not applicable.

The proceeding is governed by the Sheriffs and Civil Processes Act. Applications for garnishee proceedings are made to the court by the judgment creditor (without joining the judgment debtor as a party): that is to say, the originating application in a garnishee proceeding is made *ex parte*. The order the court makes upon the application usually comes in two stages: order *nisi* and order absolute. The word *nisi* is a Norman-French word which means "unless", It is the first order the court makes upon as *ex-parter* application in a garnishee proceeding ; it is an order made at that stage, that the sum covered by the application be paid into the court or to the judgment creditor within a stated time unless there are some sufficient reasons why the party on whom the order is directed (that is, the holder of the judgment debtor's account) has given why the garnishee order *nisi* should not be made absolute. If no sufficient reasons appear, the garnishee order *nisi* is made absolute and the holder of the judgment debtor's money shall be liable to pay the judgment sum specified in the garnishee order absolute.

In this work, we have identified and discussed some defects in Garnishee proceedings. For instance, a judgment debtor whose money is to be deducted to offset a judgment sum is not a party at all in the proceedings and the individual judgment debtor's consent is not required in law before his or her account is attached by a garnishee order *nisi* but in the case of a Judgment sum belonging to the Federal or State government under the control or custody of a public officer in his official capacity, the order *nisi* shall not be made at all unless the consent of the Attorney General of the Federation or the Attorney General of the State (as the case may be) is first obtained.

5. Recommendations

Having discussed, in this paper, some critical issues in garnishee proceedings, and having observed some lapses in garnishee proceedings in Nigeria, thus, the following recommendations;

It is recommended that there should be an amendment to the proviso to section 84 of the Sheriff and Civil Processes Act by removing the requirement of the consent of the Attorney General before attaching a judgment sum obtained against the government. The recommendation is based on its already established unconstitutionality.

Again, the proviso to section 85 of the Sheriff and Civil Processes Act should be amended to the effect that only the judgment sum shall be attached upon the service of the order *nisi* on the garnishee, and that where the judgment debtor has more money than the judgment sum, he shall be entitled to withdraw such money above the judgment sum. This recommendation is founded on the fundamental right of the judgment debtor to his unencumbered property.

It is recommended that all the States of the Federation in Nigeria should incorporate the Sheriff and Civil Process Act into their High Court (Civil Procedure) Rules, just like Kwara State has done. This could be done by making the Act a State Law. This, if done would help the State

House of Assembly in making necessary amendments to the Law. It is expressed that the State Houses of Assembly would be faster in amending Laws than waiting for the National Assembly to do that.

Moreover, incorporating the Sheriff and Civil Processes Act into the High Court of various States of the Federation would enhance easy access to the Law.

Also, it is recommended that the judgment debtor should be joined (at least as a nominal party) in garnishee proceeding. This will help in trying liability of the garnishee especially where the garnishee disputes liability.

In practice, the judgment creditor's Counsel usually joins all the commercial banks in Nigeria while in search of the particular bank where the judgment debtor has an account. Joining all the commercial banks to come and show cause is cumbersome in many ways. For instance, it predisposes banks to avoidable expenditure on litigation, also, it makes garnishee proceedings longer because all the banks would need to file affidavit to show cause before liability or discharge order is made by the court. This is avoidable.

Therefore, it is recommended that there should be a provision for the use of Bank Certificate in garnishee proceeding just like in Probate where it is used to ascertain the amount of money in bank the deceased had before his or death. This is done without joining the banks as parties to come to court and show cause.