THE EXTENT OF APPLICABILITY OF SECTION 87 OF THE SHERIFFS AND CIVIL PROCESS ACTIN GARNISHEE PROCEEDINGS

FIDELITY BANK PLC. v OKWUOWULU REVISITED

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ABSTRACT
This paper reviews the Court of Appeal's decision in Fidelity Bank Plc. v. Okwuowulu.[1] It contends that: mere denial of liability by a garnishee, upon being served with an order to appear and show cause why the order nisi should not be made absolute against him, does not trigger off the operation of section 87 of the Sheriffs and Civil Process Act[2] but rather the garnishee setting up a prima facie case; to constitute prima facie case the affidavit to show cause must not admit any issue in controversy nor contradict itself and the denial therein must be sufficient; the Court of Appeal's decision in Fidelity Bank Plc. v. Okwuowulu that section 87 of the Act becomes applicable once a garnishee denies liability is not entirely correct.

Also, this article argues that: section 87 of the Sheriffs and Civil Process Act is a rule of procedure or practice and that it is, as well, discretionary; non-compliance with it would only render a proceeding irregular and not a nullity and could be waived; an appeal thereto is not as of right but with the leave of either the trial court or the Court of Appeal. It recommends what a garnishee who wants to avail itself of section 87 of the Act will do upon denying liability and what a trial court will do in the circumstance.

Introduction
The Court of Appeal's decision in Fidelity Bank Plc. v. Okwuowulu raises the issue of the extent of applicability of section 87 of the Sheriffs and Civil Process Act in a garnishee proceeding. A garnishee proceeding is a process leading to the attachment of debt owed to a judgment debtor by a third party who is indebted to the judgment debtor. It is *sui generis* and is unlike other proceedings for enforcement of judgment.

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[1][2012] All FWLR (Pt. 664) 151.

[2]CAP. s.6 Laws of the Federation of Nigeria, 2010

A garnishee proceeding is in two stages: the first being the process of getting an order *nisi*. The order *nisi* directs the garnishee to appear in court on a specified date to show cause why an order should not be made upon him for payment to the judgment creditor the amount of the debt owned to the judgment debtor. This is usually done *ex parte;* the second is where on the return date, the garnishee does not attend, or does not dispute the debt claimed to be due from him to the judgment debtor, the court makes the garnishee order absolute and thus orders the garnishee to pay to the judgment creditor the amount of debt due from him to the judgment debtor, or so much of it as is sufficient to satisfy the judgment debt together with the cost of the proceedings and cost of garnishee.

Alternatively, at the second stage, the garnishee may dispute liability. A garnishee's disputation of liability is the lifeblood for the operation of **section 87 of the Sheriffs and Civil Process Act** and at this point the section comes into play. This article reviews the Court of Appeal's decision in Fidelity Bank Plc. v. Okwuowulu in the context of section 87 of the Sheriffs and Civil Process Act and applicability of set – off in a garnishee proceeding.

Facts – FIDELITY BANK PLC v. OKWUOWULU

Upon a principal judgment the 1st Respondent applied, *ex parte*, to the trial court for an order of garnishee *nisi* attaching debits and or monies from the garnishee to the judgment debtor for the satisfaction of the judgment debt. After hearing the 1st Respondent's counsel, the trial Judge held as follows:

1. A garnishee order nisi is made to the effect that sums of money which stands to the credit of the judgment debtor in its account with the garnishee be and are hereby attached to satisfy the judgement debt herein as well as the costs of these garnishee proceedings.

2. The garnishee is to appear before this court on 4 September 2006 to show cause why an order should not be made upon it for payment to the judgment creditor of the amount of the judgment debt owed by the judgment debtor.

3. A copy of this order shall be served on the judgment debtor.

4. The suit is made returnable on the aforesaid 4 September 2006 on which day, further hearing of the garnishee proceedings will proceed.[3]

Upon being served with the order *nisi*, the Appellant in its affidavit to show cause

[3]Fidelity Bank PLC v. Okwuowulu [2012] ALL FWLR (Pt. 644) 151 at 158 paras. D – F.

deposed that the judgement debtor, the 2nd Respondent had with it Account No. 1910849219 with a debit balance of ₦1,485,760.60k. The 1stRespondent filed a counter affidavit to the affidavit to show cause and therein deposed that the judgment debtor also had Account No. 1910849235 with a credit balance of ₦1,366,490.79kwith the Garnishee. In response, the Appellant filed a further affidavit to show cause and there deposed that its inability to discover Account No: 1910849235 was as a result of system failure to recognize the criteria used in respect of its earlier search.

In both the affidavit and the further affidavit to show cause the Appellant deposed that the judgement debtor was indebted to it.[4]After the exchange of the affidavits, the learned trial Judge adjourned the matter for hearing. Consequently, on the adjourned date, counsel for both parties argued their cases relying on the various affidavits and it was adjourned for ruling.

Finding
The learned trial Judge found that the judgement debtor, the 2nd Respondent, could still withdraw from Account No. 1910849235.

Ruling
The learned trial Judge held that the Appellant had not shown good cause since the judgement debtor could still properly make withdrawals from Account No. 1910849235[5] and thus made the order absolute.

APPEAL
Being dissatisfied, the Appellant, as garnishee, appealed against the said ruling. At the Court of Appeal the following issues arose for determination, viz:

1. Whether the lower court was right to have made the order *nisi* dated 26 June 2006 absolute when the appellant disputed its liability.

2. Whether the appellant (garnishee) can exercise a right of set-off of what is due to it from the 2nd respondent's (judgement debtor's) two accounts with the garnishee irrespective of the fact that the accounts were not merged and the judgment debtor still had full rights to withdraw from the account in credit.

Issue 1 – PARTIES' ARGUMENT
The Appellant's counsel contended that since the Appellant (garnishee) appeared and disputed its liability, the lower court, instead of making an order absolute for execution ought to have ordered that issues or questions necessary for determining the

[4] Fidelity Bank PLC. v. Okwuowulu [2012] All FWLR (Pt. 644) 151 at 159 – 160 paras. G – B.

[5]Fidelity Bank PLC. v. Okwuowulu (supra) at 161 para. B.

disputed liability be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined or even refer the matter to a referee in accordance with section 87 of the Sheriff and Civil Process Act, Cap. 407, Laws of the Federation of Nigeria, 1990. In response, the 1st Respondent's counsel argued that the learned trial judge actually tried the issues raised by the Appellant in the manner stipulated by law. Further, while relying on G**lobal Trans Oceanic S.A. v. Free Enterprises (Nig.) Ltd. (2001) FWLR (Pt. 40) 1706, (2001) 12 WRN 136**, the 1stRespondent's counsel contended that this new complaint is not covered by any of the grounds of appeal and therefore goes to no issue.

Decision

Consequently, the Court of Appeal, per Ogunwumiju, J.C.A., held that:

The ruling of the lower court making the order nisi to become absolute on 12 October 2006 which was also the return date which the garnishee disputed his liability was quite premature . . . in the circumstances. The fact that the garnishee disputed liability implied that section 87 of Sheriffs and Civil Processes Act be applied as stipulated by law. Order 8, rule 8(2) of the Judgement Enforcement Rules (JER) envisages that the court should move into another proceeding mode with the court assigning roles to each party. The garnishee may become the Plaintiff while the judgement creditor may become the defendant. The issue of the liability of the garnishee must then be tried separately. That procedure was not followed in this case. The issue is resolved in favour of the appellant. As to the complaint by the 1st Respondent that there is no complaint on this point in the grounds of appeal, I have read the grounds of appeal and I am of the view that ground 2 of the grounds of appeal adequately covers this complaint.[6]

Comment

A. EXTENT OF APPLICABILITY OF SECTION 87 OF THE ACT

The statement by the learned Justice of Court of Appeal that the fact that the garnishee disputed liability implied that section 87 of the Sheriffs and Civil Process Act be applied as stipulated by law and that the procedure envisaged by the Act was not followed may, with due respect, not be entirely correct as is demonstrated anon. For clarity, **section 87** of the **Sheriffs and Civil Process Act** provides that:

If the garnishee appears and disputes his liability, the court, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined, or may refer the matter to a referee.

[6] Fidelity Bank PLC. v. Okwuowulu [2012] All FWLR (Pt. 664) 151 at 163 – 164 paras. F – A

Implicit in **s. 87 of the Sheriffs and Civil Process Act** is that before the section becomes applicable the trial Court must find that the Garnishee, in this case the Appellant, disputes his liability. The word dispute is appropriately defined in the Websters New Twentieth Century Dictionary Unabridged, as being synonymous with controversy; an attempt to prove and maintain one's own opinions, arguments or claims of another; controversy in words.[7]

To "dispute liability" in the context of **s.87 of the Sheriffs and Civil Process Act** means to deny liability. It is only upon denying liability that there will be a controversy between the judgment creditor and the garnishee; if any material fact alleged in an affidavit is not denied in a counter – affidavit an admission of that fact is implied.[8]Thus, the learned author, **Fidelis Nwadialo** (of blessed memory) in his book, **Modern Nigerian Law of Evidence, 2nd Edition, page 534** stated thus:

Where one party swears to an affidavit the other invariably swears to a counter – affidavit unless there is nothing disputable in the affidavit. A counter – affidavit deals with the facts alleged in the affidavit by admitting or denying those facts. It also sets out the deponent's version of the transaction in the matter. It is on the facts deposed to in a counter – affidavit that the deponent thereto relies in the proceedings.

A mere denial will not suffice but rather a garnishee must set up a *primafacie* case before the court could order for an issue or any question necessary for determining his liability be tried in any manner in which any issue in proceedings may be tried.[9] Hence, a denial of every issue in or by way of an affidavit or a further affidavit to show cause must be sufficient and the deposition or evidence in the said affidavit shall not be inconsistent. Consequently, before a trial court will resort to or apply **s.87 of the Sheriffs and Civil Process Act** it must first determine that:

a. there is a denial in the affidavit to show cause;
b. the denial in the affidavit to show cause is sufficient;[10]
c. the affidavit to show cause when placed side by side with any counter affidavit thereto did not admit any of the specific issues in controversy;[11]
d. there is no conflict or inconsistency in the affidavit to show cause.[12]

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[7] Guide to Words, Phrases and Doctrines in Nigeria Law, Vol. 1 by Hon. Justice P.A. Onamade P. 373.
[8]Adesina v. Commissioner [1996] 4 SCNJ 112 at 119.
[9] The English Supreme Court Practice, 1979, Vol. 1, Sweet & Maxwell, paragraph 49/5/2
[10] Guaranty Trust Bank Plc. v. Innoson Nig. Ltd. CA/I/258/2011 – Judgment of 6th February 2014, pages 25 – 26, paragraphs 3 – 1 (Unreported)
[11]C.C.B. (Nig.) Plc. v. Ozobu (1998) 3 NWLR (Pt. 514) 290 at 310 paras. G – H; Atakpo v. Ebetor [2015] 3 NWLR (Pt. 1447) 549 at 572 paras. C – 5
[12] Arjay v. A.M.S. Ltd. [2013] 13 NWLR (Pt. 820) 577 at 627 paragraph F.

Now, the question is, testing the above enunciated principles with the affidavits to show cause and the counter affidavit thereto, did the Appellant establish a *prima facie* case to trigger off the trial court's application of s.87 of the Act? The Appellant in its affidavit to show cause suppressed the 2nd Respondent's second Account No. 1910849235in its custody – this account was at all material time in credit. If not for the 1st Respondent's vigilancy the court wouldn't have known about the existence of this account in the Appellant's custody. Though the Appellant admitted the existence of this account in its further affidavit, the suppression has shown bad faith on its part. Although, the Appellant stated the reason for not discovering the said account in its affidavit to show cause as system failure to recognise the criteria used in respect of the earlier search, such excuse is not believable and is also insufficient: the Appellant did not state the name of the system, let alone how and when it failed. Consequently, since the affidavit/further affidavit to show cause are insufficient,[13] made in bad faith, the 2nd Respondent's second Account with the Appellant being in credit and the 1st Respondent could still properly withdraw from it, the learned trial Judge need not invoke **s.87 of the Sheriffs and Civil Process Act** in the circumstance**.**

However, assuming that the learned trial Judge ought to apply **s.87 of the Sheriffs and Civil Process Act,** the procedure which **s.87 of the Sheriffs and Civil Process Act** provides is discretionary. Thus, the section provides:

If the garnishee appears and disputes his liability, the court, instead of making an order that execution shall issue, may order that any issue or question necessary for determining his liability be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined, or may refer the matter to a referee.

That **s.87 of the Sheriffs and Civil Process Act** is discretionary is supported by **Order VIII Rule 8(1)** of the **Judgment (Enforcement) Rules of Court** which provides that:

(1) If no amount is paid into court, the court, instead of making an order that execution shall issue, may, after hearing the judgment creditor, the garnishee, and the judgment debtor or such of them as appear, determine the question of the liability of the garnishee, and may make such order as to the payment to the judgment creditor of any sum found to be due from the garnishee to the Judgment debtor and as to costs as may be just, or may make an order under section 87 of the Act.

[13]Guaranty Trust Bank Plc. v. Innoson Nig. Ltd. CA/I/258/2011 – Judgement of 6th February 2014 pages 26 – 27 (Unreported).

S.87 of the Sheriffs and Civil Process Act used the words ". . . the court, instead of making an order that execution shall issue, **may order** that . . ."; and Order 8 VIII Rule 8(1) of the Judgment (Enforcement) Rules of Court also used the words ". . . the Court, instead of making an order that execution shall issue, **may** . . . determine the question of liability of the garnishee . . . **may** make an order under **s.87** of the **Act".** The word **"may order"** in a similar provision of Order 49 Rule 5 of the English Rules of Supreme Court 1965 was interpreted to be or mean discretionary.[14]

In ordinary usage the word **"may"** is permissive and or discretionary and in accordance with such usage, the word **"may"** in a statute will not be held to be mandatory**.** Thus, in **Edewor v. Uwegbu**[15]the Supreme Court, per **Nnamani J.S.C.** – lead Judgment – held that:

It has long been settled that may is a permissive or enabling expression – In Messy v Council of the Municipality of Yass (1922) 22 SR. N.S.W. 494 per Cullen, C.J. at pp. 497, 498 it was held that the use of the word 'may' prima facie conveys that the authority which has the power to do such an act has an option either to do it or not do it. See also Cotton, L.J.in Re Daker, Michell v Baker (1800) 44 CH.D 282. But it has been conceded that the word may acquire a mandatory meaning from the context in which it is used. See Johnson's Tyre Foundary Pty Ltd. v Shire of Maffra (1949) A.L.R. 88. The word may also acquire a mandatory meaning from the circumstances in which it is used. Most of the cases in which the word 'may' has the mandatory meaning relate to cases in which they are used in penal statutes conferring powers to courts. In Re Baker (Supra) Cotton L.J. said – "I think great misconception is caused by saying that in some cases "may" means must. It never can mean (must) so long as the English Language retains its meaning.[16]

It therefore follows that **section 87 of the Sheriffs and Civil Process Act** as well as **Order VIII Rule 8(1) of the Judgment (Enforcement) Rules of Court** are discretionary and the learned trial Judge was not bound to follow the procedure provided by them.[17] Although, in **Fidelity Bank Plc. v Okwuowulu** the Court of Appeal held that **s.87 of the Sheriffs and Civil Process Act** is mandatory,[18] with the greatest respect, that part of the decision does not represent the law given that:

a. it was an *obiter*. It was not part of the lead judgment. It is different from the lead judgment**;**

[14]The Supreme Court Practice, 1979 Vol. 1, Sweet v Maxwell, paras. 49/5 – 49/5/1

[15][1987] 1 NWLR (Pt. 50) SC 313.

[16]Edewor v. Uwegbu [1987] 1 NWLR (Pt. 50) SC 313 at 339 paras. B – D; Nicholl v Allen (1862) 31 L.J.Q.B. 283; Cooper v Hall [1968] 1 W.L.R. 360; Maxwell on the Interpretation of Statutes, 12th Edition page 234.

[17]The discretion must be exercised judiciously and judicially.

[18]Fidelity Bank PLC. v Okwuowulu [2012] All FWLR (Pt. 644) 151 at 169 paras. F.

b. issue of whether **s.87 of the Sheriffs and Civil Process Act** is discretionary was neither raised nor addressed by any of the parties and the court did not invite the parties to address it on that;

c. it was *perincuriam*. The learned justice of the Court of Appeal did not give any reason for arriving at that decision nor analyse the existing Supreme Court cases interpreting the word "may" nor distinguish the said Supreme Court decisions. Also, it did not follow the Supreme Court's decision in **Edewor v Uwegbu [1987] 1 NWLR (Pt. 50) SC 313** in which the Supreme Court interpreted the word "may".

Meanwhile, if**s.87** of the **Sheriffs and Civil Process Act** is mandatory, the section did not specify any particular manner for determining any issue or question necessary for determining a garnishee's liability. Hence**,** the mode or the manner to be used in determining the issue or question necessary to determining the garnishee's liability is at the discretion of the Court. It is trite that questions or issues in dispute may either be tried through affidavit evidence, originating motions or summons, writ of summons/ statement of claim and statement of defence.[19]

As could be seen from the law report the parties filed various affidavits viz: affidavits to show cause; counter affidavit to the affidavit to show cause and; a further affidavit to show cause. It is also clear from the said affidavits that one of the parties is making a claim while the other is defending. This is the traditional role implicit in a statement of claim. A statement of claim shows who is claiming and who is defending. It could also be seen from the law report that the learned trial Judge adopted the procedure chosen by the parties and none of the parties complained then. That procedure is also one of the modes of trying disputes or determining issues in controversy and thus within the ambit or purview of **section87** of the **Sheriffs and Civil Process Act.**

Therefore, the procedure which the learned trial Judge followed was in compliance with section 87 of Sheriffs and Civil Process Act and with **Order VIII Rule 8(1) of the Judgment (Enforcement) Rules of Court** as well**.** Thus, the Court of Appeal's holding that the procedure was not followed in this case is, with the greatest respect, erroneous.

[19]Fidelis Nwadialo: Civil Procedure in Nigeria, 2nd Edition pages 531 paragraph 4. Order 3 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009, Okpala v. Okpu [2003] 5 NWLR (Pt. 812) SC 183

B. Effect of Non Compliance with Section 87 of the Act & Time to Object.

Another question which arose from the facts of the case is the consequence of non-compliance with section 87 of the Act and when to challenge non-compliance with it. **Section 87 of the Sheriffs and Civil Process Act** as well as **Order VIII Rule 8 (1) of the Judgment (Enforcement) Rules of Court** are rules of procedure and or practice.[20]A breach of rules of practice or procedure can only render a proceeding an irregularity and not a nullity and; such irregularity can only be set aside if the party affected by it acted timeously and before taking a fresh step in the proceedings.[21]

After filing its affidavit and further affidavit to show cause, the Appellant participated in the proceedings of 29th September 2006 and argued its case, relying on the affidavits filed therein, without challenging the procedure adopted by the learned trial Judge.[22] It therefore follows that the Appellant waived its right to complain about the learned trial Judge's non-compliance with **section 87 of the Sheriffs and Civil Process Act** as well as **Order VIII Rule 8 (1)** of the Judgment (Enforcement) Rules of Court and thus has no right to raise it at the Court of Appeal. However, the 1st Respondent failed to challenge the appeal on this ground. Since the 1st Respondent did not raise the issue of the Appellant having waived its right to raise the issue of the learned trial Judge's non-compliance with section 87 of the Sheriffs and Civil process Act, the Court of Appeal was right in not considering that point.

C. Appeal Against Non-compliance with Section 87 of the Act.

Question of appeal against the trial court's failure to comply with section 87 of the Sheriffs and Civil Process Act is also raised by the facts of the case – Fidelity Bank Plc. v. Okwuowulu. **Section 87** of the **Sheriffs and Civil Process Act** provides the procedure a trial court will follow in determining whether to make an order *nisi* absolute should a garnishee disputes liability.[23]Upon proper construction, we submit that within **section 87** of the **Sheriffs and Civil Process Act, t**here are two procedural and discretionary decisions a trial court will make, viz:

a. whether any question or issue necessary for determining a garnishee's liability will be tried or determined in any manner in which any issue or question in any proceedings may be tried or determined;

[20]Fidelity Bank PLC.v Okwuowulu [2012] All FWLR (Pt. 644) 151 at 163 paras D – F.

[21]Duke -v- Akpabuyo L.G. [2005] 19 NWLR (Pt. 959) 130 at 144 paragraphs G – H; Nalsa & Team Associates -v- NNPC [1991] 11 – 12 SC 83 page 91 paragraph 30

[22] Fidelity Bank PLC. v. Okwuowulu [2012] All FWLR (Pt. 644) 151 at 158 paras. G – H

[23] Fidelity Bank PLC. v. Okwuowulu [2012] All FWLR (Pt. 664) 151 at 163 – 164 paras. D – F.

b. within the "in any manner" which of the manners would be followed given that there are more than one manners of determining or trying liability in a matter, viz: by affidavit, by pleading, - writ of summons, statement of claim/defence.[24]

Been a procedural issue, any decision or inaction therein is an interlocutory and a discretionary decision and an appeal against such a decision cannot lie as of right but rather with the leave of either the trial High Court or the Court of Appeal. There is nothing on the law report to show that the Appellant obtained the prior leave of the court to appeal against the learned trial Judge's non-compliance with section 87 of the Sheriffs and Civil Process Act. To this extent, the court lacked the jurisdiction to entertain any appeal or issue based on that ground.[25] However, since the 1st Respondent did not raise the issue of court's lack of jurisdiction to entertain that ground of appeal and any issue emanating there from the court may not be criticised in respect thereof.

Again, the Appellant cannot raise or argue the issue of non-compliance with **s.87 of the Sheriffs and Civil Process Act** at the Court of Appeal for the first time without the leave of the court same having not being raised at the trial court and having not obtained the leave of the court the issue is incompetent.[26]The 1st Respondent did not raise this point, therefore, the Court is not bound to raise nor determine it**.**

On the Respondent's counsel's contention that the new point – the learned trial Judge's non – compliance with Section 87 of the Sheriffs and Civil Process Act – was not covered by any grounds of appeal, the Court of Appeal was right in holding that ground 2 of the grounds of appeal covered the complaint. However, for ground 2 of the Appeal that covered the complaint to be valid, prior leave of the court to raise and argue it ought to have been obtained.[27]There was nothing in the law report showing that the Appellant obtained the leave of the court to raise that point. Concomitantly, the report did not show that the 1st Respondent's counsel raised the issue of the Appellant not obtaining leave to raise and argue same. Thus, the Court of Appeal was right in resolving this issue as it did.

Issue 2 – PARTIES ARGUMENT

The Appellant contended that: in making the order absolute the trial court came to the conclusion that there was no evidence before the court that the 2nd Respondent's two separate accounts – one in debit and the other in credit – in the custody of the Appellant had been merged; the Appellant's deposition in its affidavit to show cause

[24]Order 3 Rule 1 of the Federal High Court (Civil Procedure) Rules 2009; Okpala v Okpu [2003] 5 NWLR (Pt. 812) SC 183.

[25]S.242 (1) of the 1999 Constitution as amended; UBA v. GMBH [1989] 3 NWLR (Pt. 110) SC 374 at 389 paragraph B; Iroegbu v. Okwordu [1990] 10 SCNJ 87 at 103

[26]Modupe v. State [1988] 2 NWLR (Pt. 87) 130; Morolunfode v. Adeoti [1997] 6 NWLR (Pt. 508) 327.

[27]Modupe v. State [1988] 2 NWLR (Pt. 87) 130; Morolunfode v. Adeoti [1997] 6 NWLR (Pt. 508) 327.

that it received the order *nisi* on 11th September 2006 was neither challenged nor contradicted by the 1st Respondent and the court failed to act on this evidence; a garnishee may set – off what is due to him from the judgment debtor before the issue of order *nisi* citing and relying on **Tapp v. Jones (1875) LR 10 QB 591**;as at the time the Appellant received the order *nisi* the judgment debtor – 2nd Respondent – by a set – off was indebted to the Appellant in the sum of ₦119,269.81k; the Appellant has an inherent right of set – off even where the claim as basis of the set – off arose from a different transaction or a different account as in the instant case.

In response, the 1st Respondent argued that the Appellant did not merge the two accounts – There was no deposition to this effect in the Appellant's affidavit to show cause; the cases of **Tapp v. Jones (1875) LR 10QB591** and **O.A.U. v. Olanihun (1996) 8 NWLR (Pt. 8464) 123** did not decide that account can be merged by oral address of counsel; merger of the two accounts, and or exercise of right of set off are matters of fact and must be deposed to effectively by the Appellant.

Decision

The Court of Appeal held that:

The authorities are of the view that a garnishee is entitled to set – off any debt due to him from the judgment debtor at the date when the order nisi was served upon him and the garnishee is equally entitled to a counterclaim against the judgment debtor, at any rate where it arises out of the same transaction as the debt sought to be attached: Tapp v Jones (1975) LR 10 QB 591 at 593; Hale v Victoria Plumbing Co. Ltd. (1966) 2 QB 746.However, the garnishee cannot set – off debts accruing after service of the garnishee order nisi, nor can he set – off a debt due to him from the judgmemt creditor: Sampson v Seaton RLY Corp. (1874) LR QB 28; O.A.U. v Olanihun.[28]

The Court of Appeal further stated that the main issue raised by the learned respondent's counsel is whether the lower court ought to have discharged the order of garnishee nisi when the judgment debtor still had full rights to withdraw from the account in credit. In resolving this issue, the Court of Appeal relied on the various affidavits filed by the parties and further held thus:

Nowhere in the later affidavit did the Appellant indicate that the two accounts had been merged or that the bank had exercised any existing right of set – off in respect of the two accounts. Thus, the account in credit was still accessible to the judgment debtor. However, in Joe Golday Co. Ltd v. Co-operative Development Bank Plc. (2003) FWLR (Pt. 153) 376, (2003) 2 SCNJ 1, Uwaifo, JSC reading the lead judgement of the Supreme Court held at page 21 that a banker may consolidate the accounts owned by agreement in his own right, unless precluded by agreement,

[28]Fidelity Bank PLC. v. Okwuowulu [2012] All FWLR (Pt. 644) 151 at 165 paras. D – F

express or implied from the course of business from doing so, in order to ascertain and treat as the balance, the amount standing to the credit of the customer. The Supreme Court held that it is a prudent way open to the banker to assess the financial worth with it of that customer. The exception to the right of set-off may be where a banker opens two accounts for a customer, one in the customer's business name or incorporated body /company and the customer's personal name. Both accounts cannot be merged by the bank as of right: British and French Bank Ltd. v Opaleye (1962) All NLR 26, (1962) 1 SCNLR 60. It is my humble view that in the circumstances of this case, the very nature of garnishee proceedings entitles the garnishee to set-off the indebtedness of the judgment debtor. This is because, the order nisi presupposes that the garnishee is indebted to the judgement debtor as at the time the order was made. If according to the records of the garnishee which is largely disputed, there was an indebtedness on the part of the judgment debtor, then I do not see how the court can in equity and law force a bank in essence to pay its own money to satisfy a judgment debt incurred by a customer.[29]

Comment

The decision of the learned trial Justice of the Court of Appeal as regarding set – off in relation to garnishee proceedings is correct in law. I entirely agree with the decision. However, it must be observed that the learned Justices of the Court of Appeal having found that the learned trial Judge did not comply with section 87 of the Sheriffs and Civil Process Act, that is, – that the learned trial Judge followed the wrong procedure – ought not to have resolved issue 2 but rather would have remitted the case to the Chief Judge of the Lagos State High Court for re – assignment to another Judge of the court for determination of the issues in accordance with the correct procedure and or in compliance with section 87 of the Act.

In determining issue 2 and in looking at or in relying on the various affidavits of the parties, as the learned trial Judge did, the learned Justices of the Court of Appeal gave credence to our contention that the learned trial Judge complied with section 87 of the Act; the mode or manner of determining the question or issue of the garnishee's liability is at the discretion of the trial court; and that the question of liability could be determined through affidavit evidence.

Conclusion

Section 87 of the Sheriffs and Civil Process Act is not applicable as a matter of course or once a garnishee disputes liability. A garnishee's affidavit to show cause must set up a *prima facie* case – its denial must be sufficient, must not admit any issue in controversy nor contradict itself – before a trial court will apply the section.

[29]Fidelity Bank PLC. v. Okwuowulu [2012] All FWLR (Pt. 644) 151 at 167 – 168 paras. H – E

Neither section 87 of the Act nor Order VIII Rule 8(1) of the Judgment (Enforcement) Rules of Court provides any particular manner or mode for determining any issue or question necessary for determining a garnishee's liability and thus this is left at the discretion of the trial court. Issues or questions in controversy could be tried through affidavit evidence, originating motions or summons or writ of summons and statement of claim and defence. A trial court may choose any of these methods or adopt any of them already chosen by the parties.

Both section 87 of the Act and Order VIII Rules 8(1) of the Judgment (Enforcement) Rules of court are rules of procedure and or practice. A breach of a rule of procedure or practice can only render the proceeding involved irregular and not a nullity. Any party affected by such irregularity shall promptly, before taking any fresh step in proceedings, apply to have it set aside, else, it will be deemed to have waived its right in respect thereto.[30]

The decision of the Court of Appeal in Fidelity Bank Plc. v Okwuowulu as regarding the applicability of set – off in or to a garnishee proceedings is good in law while as regarding section 87 of the Sheriffs and Civil Process Act is, in the circumstance of the case, an error in law and should not be followed.

It is recommended that a garnishee who intends to avail itself of section 87 of the Sheriffs and Civil Process Act shall upon denying liability through its affidavit to show cause invite the trial court to apply the section in determining its liability; and a trial court, when invited, shall examine the affidavit to show cause alongside a counter affidavit thereto – if there is any – to determine whether the garnishee made out a *prima facie* case before applying the section. What will amount to a *prima facie* case in the circumstance include sufficient denial, non-admission of any issue in controversy and the affidavit to show cause not contradicting itself.

[30]N.U.B. Ltd. v. Samba Pet Co. Ltd. [2006] 12 NWLR (Pt. 993) 98 at 123 paras. A – G; Odua Investment Ltd. v. Talabi [1997] 10 NWLR (Pt. 523) 1 at 53 paras. C – F; Ariori v. Elemo [1983] 1 SC 12.