

COURT OF APPEAL, ENUGU DIVISION  
18TH MAY, 1993 CA/E/100/91  
CORAM:- U. ABDULAH, S.O. UWAIFO, S.A. AKINTAN, JJCA

UGAGA OKWOCHÉ ..... CREDITOR/APPELLANT  
AND  
PETER DIBIA ..... CLAIMANT/RESPONDENT

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COURT PROCESSES - Actions - Interpleader proceedings - Challenging execution levied by the sheriff - Though it has some minor irregularities - The case was initiated by due process of law (H1)

APPEALS - Evidence - Courts - Available evidence - Was not relied upon by trial court - In deciding the case (H2)

JUDGMENTS - Execution - Judgment debtor bearing two names - Move to fraudulently assign his vehicle - On which execution was levied to his brother - Will not be allowed (H3)

JUDGMENTS - Writ of execution - As it becomes operational - Any transfer of the goods - Will not limit the sheriff's right - Save where the transfer is in a market overt (H4)

JUDGMENTS - Execution - Third party claim to attached vehicle - Being fraudulent - Will not be allowed - To defeat judgment creditor's interest (H5)

APPEALS - Judgments - Writ of execution - Courts - Attachment of vehicle under the writ - Was wrongfully disturbed by trial court (H6)

**FACTS**

The judgment creditor/appellant obtained judgment before the Ogoja High Court for the sum of N20,000.00 against Boniface Nkwo and Michael Dibia. He caused execution to be levied on a Peugeot 404 Pick-up van supposed property of Michael Dibia, judgment debtor, also

called Nwafor Eze. A first attempt was made to attach the said vehicle without success. By the time it was attached, the claimant/respondent filed an interpleader summons asserting ownership of the vehicle. He claimed inter alia, for loss of use at the rate of N200.00 a day and N5,000 general damages.

After hearing the evidence of the parties the trial court found in favour of the claimant, setting aside the attachment. The trial judge failed to consider properly the evidence before him that suggested that the claimant's claim to the vehicle is fraudulent. Claimant being the brother of the judgment debtor, Michael Dibia, it seemed the alleged transfer of ownership of the vehicle to claimant was calculated to defeat the judgment creditor's interest. Being dissatisfied, the judgment creditor has now appealed to the Court of Appeal.

#### **ISSUES OF DETERMINATION**

*"1. Whether the action was initiated by due process and if not whether the lower court was competent to entertain it as constituted.*

*2. Whether on the evidence the learned trial judge was right in holding that the vehicle belonged to the claimant/respondent.*

*3. Whether on the evidence the damages could be justified."*

**HELD** (Unanimously allowing the appeal per UWAIFO JCA)

#### **COURT PROCESSES - Actions - Interpleader proceedings**

1. In a supplemental record compiled by the respondent, it has been shown that Form 10 was duly signed by the Judge as the summons. There are however some irregularities on the said Form regarding the title of the action. It was not shown that the Sheriff was a party. This ought to have been clear on the face of the summons and also it must be indicated of which court is the Sheriff. The original parties to the action in respect of which execution was levied ought also to have been stated on the summons. Apart from these minor irregularities, the case was initiated by due process of law. (p. 1602 F)

#### **APPEALS - Evidence**

2. As regards issue 2, from what I have earlier said above, it is clear that

the learned trial judge failed to decide the case on the evidence available. The learned judge accepted that the judgment creditor had attempted to levy execution on the vehicle on 11 November, 1988 although the claimant denied this. It was clearly after this attempt that change of ownership was effected on 15 November. This was the first indication that the alleged sale was contrived. The document of sale was in the circumstances faked. (p. 1603 A)

#### **Execution - Judgment debtor bearing two names**

3. Michael Dibia (the judgment debtor) was identified to be the same person as Nwafor Eze; that is to say Nwafor Eze is the alias of Michael Dibia. He used the name Nwafor Eze to buy the vehicle in question. Since there is no other real person known as Nwafor Eze connected with the transaction, the claimant conveniently said Nwafor Eze could no longer be found. The circumstances show that the claimant a brother of the judgment debtor had to be presented as the purchaser from Nwafor Eze to defeat the judgment creditor's interest. Had that not been done, no Nwafor Eze would have been available to challenge the execution.

(p. 1603 B)

#### **Writ of execution - As it becomes operational**

4. It is the law that any transfer or assignment of goods after the date at which the binding power of the writ of execution operates against them will (except in the cases of a purchaser in market overt or a purchaser in good faith for value without notice) be subject to the sheriff's right to follow up and seize the goods under the writ. In Samuel v Duke (1838) 3 M. & W. 622 at 629; 150 E.R. 1294 at 1297, Parke B. said:

*"The jury having found that the transfer of the property to the plaintiff was bona fide, one difficulty is removed out of his way; but then the defendants contend that the transfer was not good in law, as it took place after the delivery of the writ to the sheriff. Now it is perfectly clear to me, both upon decided cases and the reason for the thing, that after a writ of execution has been delivered to the sheriff, the defendant may covey his property; but that the sheriff has a right to the execution not*

*withstanding the transfer..... the right speaks from the time of the delivery of the writ upon the receipt of which the sheriff is to levy."*

(p 1604 E)

**B Execution - Third party claim to attached vehicle**

5. The good faith of the claimant in the present case is certainly called into question as a crucial issue having regard to the questionable nature of the alleged transfer of the vehicle under which the judgment debtor would endeavour to avoid his obligation to the judgment creditor. The fraudulent transfer took place, no doubt, after the writ of execution had been delivered to the sheriff. The claimant cannot be said to have established his claim upon the facts. It must be clear that he has discharged this burden before he can be granted relief. He has, in my view, from the totality of the evidence failed in that regard. When, as in the present case, the purpose of the claimant is to defeat or act in fraud of the judgment creditor's interest, the court will be justified in permitting the execution to proceed accordingly. (p. 1605 G)

**E Attachment of vehicle - Was wrongfully disturbed by trial court**

6. I think the learned judge ought to have allowed the attachment of the Peugeot 404 pick-up with registered number CR 2763J to remain. There was no sufficient reason to grant relief to the claimant and to award him any damages since he failed to prove that the said vehicle genuinely belonged to him. I accordingly allow this appeal. The judgment and orders of the law court together with the order for costs are hereby set aside. It is ordered that execution levied by the sheriff should remain. I dismiss the cross-appeal. (p. 1606 B)

**REPRESENTATION**

Essien H. Andrew Esq., for the judgment creditor/appellant.  
Obojor A. Ogar Esq., for the claimant/respondent.

**CASES REFERRED TO**

Madukolu v Nkemdilim (1962) 2 SCNL 341  
Saunde v Abdullahi (1989) 4 NWLR (pt.116) 387 at 421- 422

Samuel v Duke (1838) 3 M. & W. 622 at 629; 150 E.R. 1294 at 1297

Mcpherson v Temiskamig Lumber Co. Ltd (1913)A.C. 145 at 156

**STATUTES REFERRED TO**

Sheriffs and Civil Process Law Cap. 108 Vol. vi Laws of Cross River State s. 33

Sale of Goods Act 1893 s. 26(1)

**LEAD JUDGEMENT BY UWAIFO JCA**

\_\_\_\_\_The judgment creditor/appellant obtained judgment on 5 July, 1987 at the High Court, Ogoja for the sum of N20,000.00 against Boniface Nkwo and Michael Dibia in Suit No. HJ/4/96. He caused execution to be levied on a Peugeot 404 Pick-Up van, with registered number CR 2763 J. The Claimant/Respondent asserted ownership of the said vehicle. He claimed for loss of use at the rate of N200.00 a day and N5,000.00 general damages. He also alleged that when the vehicle was attached and taken away by the bailiff in the company of the police and the judgment creditor, at his store in the market, he went with them leaving his store unmanned. In that situation some clothing material worth N1,600.00 was stolen from his store. He therefore claimed the said amount.

Evidence was led by both sides. On 29 November, 1989, Binang, J., found for the claimant and awarded him damages of N4,320.00 calculated at the rate of N20.00 (twenty naira) for a period of 216 days with costs of N250.00. He also set aside the attachment and ordered the release of the vehicle together with its particulars and keys to the claimant.

The judgment creditor has appealed raising the issue of competency of the proceedings and the correctness of the decision. The claimant cross-appealed against the award as being grossly inadequate and unjustified. In the appellant's brief of argument the following issues for determination were raised:

1. *Whether the action was initiated by due process and if not whether the lower court was competent to entertain it as constituted.*

2. *Whether on the evidence the learned trial judge was right in holding that the vehicle belonged to the claimant/respondent.*

3. *Whether on the evidence the damages could be justified.*"

The claimant in his respondent's brief of argument virtually adopted issues 1 and 2 above but added two more to cover his cross-appeal. They are stated as issues (iii) and (iv) as follows:

B "(iii) *Whether on the evidence the amount awarded by the trial judge as damages for loss of use was not grossly inadequate.*

(iv) *Whether the learned trial judge was right in holding that the loss of the claimant/respondent's trousers materials when he was compelled by the appellant to leave his articles of trade in an open market*  
C *unattended was too remote to be traced to the act of the appellant."*

The facts of this case show that the claimant is the brother of Michael Dibia, one of the judgment debtors. The evidence to be resolved by the trial court shows that Michael Dibia, as alleged by the judgment creditor, goes also by the name Nwafor Eze although this was denied by  
D both the claimant and Michael Dibia. Efforts had been made by the bailiff, the police and the judgment creditor on 11 November, 1988, according to the judgment creditor to attach the vehicle with registered number CR 2763J but because Michael Dibia was not seen, it was left. It was on 23  
E November, 1988 it was attached. On that day the claimant laid claim to it. The fact that the bailiff had tried to levy execution on 11 November was spiritedly denied by the claimant. The learned judge accepted the evidence of the judgment creditor as to the first attempt at attachment on  
F 11 November. It is important to bear this in mind as i shall show later.

There is the further fact that on 15 November, 1988, the claimant effected change of ownership of the vehicle, which had been registered in the name of Nwafor Eze, to his name. He also on that date did the registration, insurance, road worthiness and license of the vehicle. The relevant documents were admitted as exhibits A, B, C and D. By the  
G time execution was carried out on 23 November, 1988 the vehicle had apparently become that of the claimant. Although, as already said, the claimant denied that execution was first attempted on 11 November, 1988, an aspect of his evidence in cross-examination appears to have given him out. He said:

H "*The bailiffs came to me first on 16/11/88. I am not telling lies.*

*They did not come to me first on 11/11/88. Exhibits A, B, & C were made on 15/11/88 after the bailiffs have come to fifi (sic) my brother's property".*

The claimant alleged that he bought the vehicle from Nwafor Eze on 8 September, 1984 for which he said he entered into an agreement with the said Nwafor Eze as per exhibit F. But exhibit F was affixed with an adhesive post office stamp made in 1988. The judgment creditor's contention was that the agreement was not genuine but was made for the purposes of this case, and that the adhesive stamp betrayed the claimant. The claimant's explanation was that that adhesive stamp was put there to replace the original one used for the agreement which he said had fallen  
C off. When asked in cross-examination whether he could produce the said Nwafor Eze from whom he alleged he bought the vehicle, he answered:

"*I cannot produce Nwafor Eze because since this matter came up I have been at Abakaliki to check if I could see him and was told he*  
D *has packed to unknown place."*

The double name used by Michael Dibia (judgment debtor) was an issue. In other words, the true identity of Nwafor Eze was an important, and indeed a crucial, fact. The judgment creditor called a witness, Amuda E Raman (d.w.2), from whom the Peugeot 404 pick-up van was bought by Nwafor Eze. He testified as follows:

"*I know one Nwafor Eze as one of my customers. I know him through one Paul Chukwu. Nwafor Eze bought one 404 pick-up from*  
F *me. Later Nwafor Eze registered the vehicle and brought the registration number to me; the number was CR 2763J. When Nwafor Eze bought the 404 pick-up van from me DW1 was at his home in Ondo State. I issued purchase receipt to Nwafor Eze .....I know Nwafor Eze (P.W.2) as my*  
G *customer. He is here in court. Nwafor Eze testified in this court as PW.2 in the name of Michael Dibia ..... I will be surprised to hear that Nwafor Eze has denied being called Michael Dibia."*

So from the evidence available before the trial court, there were issues as to (a) the genuineness of exhibit F which the claimant relied  
H on as his purchase document, as to whether it was contrived to defraud the creditor by back-dating it to 1984 but affixing a 1988 stamp thereto; (b) whether Nwafor Eze exists as a separate person from Michael Dibia

having regard to the evidence of d.w.2 as to who Nwafor Eze is and the evidence of the claimant that the Nwafor Eze he bought from could no more be found – he has left his last abode to an unknown destination:

The first issue for determination raised by the appellant concerns the propriety of the process by which this action was initiated. The argument by appellant's counsel is that the process of law provided by the Sheriffs and Civil Process Law (CAP.108) Vol. VI Laws of the Cross River State under section 33 relating to Interpleader summons was not followed. As a result it was contended that the case did not come before the court initiated by due process of law and upon fulfillment of any condition precedent to the hearing and determination of the case. This is one of the conditions giving a court competency as laid down in Madukolu v Nkemdilim (1962) 2 SCNL 341. This has been followed in several cases including Western Steel Works Ltd v Iron and Steel Workers Union (1986) 3 NWLR (pt,30) 617 at 627 per Obaseki JSC; Saunde v Abdullahi (1989) 4 NWLR (pt.116) 387 at 421-422 per Karibi-Whyte JSC.

It appears in the present case, the record of appeal compiled by the appellant with the leave of this Court was incomplete and misleading. It does not contain the appropriate Form for interpleader proceedings by which this case was originated. **In a supplemental record compiled by the respondent, it has been shown that Form 10 was duly signed by the Judge as the summons. There are however some irregularities on the said Form regarding the title of the action. It was not shown that the Sheriff was a party. This ought to have been clear on the face of the summons and also it must be indicated of which court is the Sheriff. The original parties to the action in respect of which execution was levied ought also to have been stated on the summons. Apart from these minor irregularities, the case was initiated by due process of law.**

**As regards issue 2, from what I have earlier said above, it is clear that the learned trial judge failed to decide the case on the evidence available. The learned judge accepted that the judgment creditor had attempted to levy execution on the vehicle on 11 November, 1988 although the claimant denied this. It was clearly after**

**this attempt that change of ownership was effected on 15 November. This was the first indication that the alleged sale was contrived. The document of sale was in the circumstances faked.**

**Michael Dibia (the judgment debtor) was identified to be the same person as Nwafor Eze; that is to say Nwafor Eze is the alias of Michael Dibia. He used the name Nwafor Eze to buy the vehicle in question. Since there is no other real person known as Nwafor Eze connected with the transaction, the claimant conveniently said Nwafor Eze could no longer be found. The circumstances show that the claimant a brother of the judgment debtor had to be presented as the purchaser from Nwafor Eze to defeat the judgment creditor's interest. Had that not been done, no Nwafor Eze would have been available to challenge the execution.**

In accordance with Form 10 of the Sheriffs and Civil Process Law addressed to the claimant, the onus was on the claimant to prove that the vehicle truly belonged to him. Paragraph one of the Form runs thus:

*"You are hereby summoned to appear at a court to be Holden at Ogoja on the 7<sup>th</sup> day of December, 1988 at the hour of 9 O'clock in the forenoon, to support a claim made by you to a Pick-up vehicle No. CR 2763J taken in execution under process issuing out of this Court at the instance of the judgment creditor: And in default of your then establishing such claims, the said Pick-up vehicle No. CR 2763J will be sold and the proceeds thereof paid over according to the exigency of the said process."*

The question is, has the claimant established his claim? The learned judge ought to have been wary of the facts and circumstances of the alleged transfer of the vehicle to the claimant. He should have considered whether the said transfer was intended or could reasonably suggest an intention to be in fraud of the judgment creditor. The vehicle falls within goods bound by writ of execution under section 26(1) of the Sale of Goods Act 1893 applicable in Akwa Ibom State. That subsection provides:

*"26 (1) A writ of fieri facias or other writ of execution against goods shall bind the property in the goods of the execution debtor as from the time the writ is delivered to the sheriff to be executed; and, for*

*the better manifestation of such time, it shall be the duty of the sheriff, without fee, upon the receipt of any such writ to endorse upon the back thereof the hour, day, month and year when he received the same. Provided that no such writ shall prejudice the title to such goods acquired by any person in good faith and for valuable consideration, unless such person had at the time when he acquired his title notice that such writ or other writ by virtue of which the goods of the execution debtor might be seized or attached had been delivered to and remained unexecuted in the hands of the sheriff."*

It seems to me that whether under the subsection or the proviso or both, the claimant is caught having regard to the facts of this case.

**It is the law that any transfer or assignment of goods after the date at which the binding power of the writ of execution operates against them will (except in the cases of a purchaser in market overt or a purchaser in good faith for value without notice) be subject to the sheriff's right to follow up and seize the goods under the writ. In Samuel v Duke (1838) 3 M. & W. 622 at 629; 150 E.R. 1294 at 1297, Parke B. said:**

*"The jury having found that the transfer of the property to the plaintiff was bona fide, one difficulty is removed out of his way; but then the defendants contend that the transfer was not good in law, as it took place after the delivery of the writ to the sheriff. Now it is perfectly clear to me, both upon decided cases and the reason for the thing, that after a writ of execution has been delivered to the sheriff, the defendant may convey his property; but that the sheriff has a right to the execution notwithstanding the transfer..... the right speaks from the time of the delivery of the writ upon the receipt of which the sheriff is to levy."*

The Privy Council in Mcpherson v Temiskamig Lumber Co. Ltd (1913) A.C. 145 at 156 relied on the above passage. It said that when goods have been attached the execution cannot be defeated if in the interval the owner had transferred his rights in the goods, and that,

*"the only exception to this is the case of a title being acquired by a third party in good faith and for valuable consideration and without notice of the writ having been delivered to the sheriff and remaining unexecuted. It seems to their Lordships that if these principles are violated*

*the way is opened up to the defeat of the execution, creditor's rights, and, as the circumstances of this case very plainly shew, to transactions of a questionable nature which debtors would endeavor to avoid their just obligations."*

Danckworts, J., adverted to section 26(1) of the Act and made similar observations in Re Cooper (1958) 3 All ER 97 at 100. See also Imray v Magnay (1847) 11 M. & W. 267 at 276; 152 E.R. 803 at 807 by way of illustration in comparison with the facts of this case where Parke B. said inter alia:

*"In the present case, part of the goods seized under Bebb's writ was unsold. They were claimed by Palmer; they had been in possession of Gomperts before, and if Palmer's claim was untenable ..... and the judgment at the suit of Bebb void against the plaintiff's execution, so that these goods could not be sold under it to the prejudice of the plaintiff's execution, the sheriff was liable to this action for not selling them. The remainder sold the Bebb was also sizeable, as Bebb, on the hypothesis, was a party to the fraud against creditors; and the sheriff was responsible for neglecting to seize and sell them; if he had notice of the fraud, or could have discovered it by reasonable inquiries; and of this there was sufficient evidence for the jury."*

**The good faith of the claimant in the present case is certainly called into question as a crucial issue having regard to the questionable nature of the alleged transfer of the vehicle under which the judgment debtor would endeavour to avoid his obligation to the judgment creditor. The fraudulent transfer took place, no doubt, after the writ of execution had been delivered to the sheriff. The claimant cannot be said to have established his claim upon the facts. It must be clear that he has discharged this burden before he can be granted relief. He has, in my view, from the totality of the evidence failed in that regard. When, as in the present case, the purpose of the claimant is to defeat or act in fraud of the judgment creditor's interest, the court will be justified in permitting the execution to proceed accordingly.**

**I think the learned judge ought to have allowed the attachment of the Peugeot 404 pick-up with registered number CR 2763J to remain. There was no sufficient reason to grant relief to the claimant**

**and to award him any damages since he failed to prove that the said vehicle genuinely belonged to him. I accordingly allow this appeal. The judgment and orders of the law court together with the order for costs are hereby set aside. It is ordered that execution levied by the sheriff should remain. I dismiss the cross-appeal award costs of N550.00 in favor of the judgment creditor against the claimant.**

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**ABDULLAHI JCA**

I am satisfied that my learned brother Uwaifo JCA had adequately considered all the relevant issues in his lead judgment, which I had the benefit of preview.

I agree with his reasons and the conclusion reached by him. I also allow the appeal and dismiss the cross-appeal. I abide by the order of costs.

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**AKINTAN JCA**

I had a preview of the judgment written by my learned brother, Uwaifo, J.C.A. The facts of the case as well as the issues raised in the appeal are adequately set out and discussed therein. I agree with his conclusion that the learned trial Judge ought to have allowed the attachment of the Peugeot 404 pick-up van in issue. I also allow the appeal and make the same orders as in the said judgment including those for costs.