The Nigerian Court of Appeal recently revisits the principles for the grant of Mareva Injunction

The focus of this write-up is a brief case note on a recent decision of the Nigerian Court of Appeal (reported two days ago) on *Mareva* injunction.

The principal concern of a judgment creditor is that it should reap the fruits of the judgment. A judgment is useless or nugatory if the judgment debtor has no assets within the jurisdiction of the court and the judgment debtor is unwilling to comply with the court's judgment. A prospective judgment debtor could frustrate the administration of justice and commercial effectiveness of a judgment by moving away all its assets from the Nigerian jurisdiction to another jurisdiction. The remedy of a *Mareva* injunction (or freezing injunction) was developed as a means of curtailing this form of bad litigation tactics by a judgment debtor. In reality, a *Mareva* injunction is similar to interlocutory and anticipatory injunctions. It is similar to an interlocutory injunction because it is granted pending the determination of the dispute between the parties. It is similar to an anticipatory injunction because it anticipates that there is a real likelihood that a prospective judgment debtor would take its assets out of the court's jurisdiction in order to frustrate the effectiveness of a judgment.[1]

The *Mareva* injunction (as applied in Nigeria) was developed in the English case of *Mareva Compania Naviera SA v International Bulkcarriers SA The Mareva* ("*The Mareva*").[2] It is also described as a "freezing injunction" on the basis that the order freezes the assets of a prospective judgment debtor, pending the determination of the case.[3]

Prior to the decision of the English Court of Appeal in *The Mareva*, it was uncertain[4] whether the English court had jurisdiction to protect a creditor before it obtained a judgment. The English Court of Appeal, in 1975,[5] had initially granted a "Mareva injunction" in the form of an interlocutory injunction, but the application of this concept in that case remained controversial.[6] The remedy of

the *Mareva* injunction was later accepted by the then English House of Lords,[7] and is available in other Commonwealth jurisdictions.[8]

In the landmark case of *Sotuminu v Ocean Steamship (Nig) Ltd*("*Sotuminu*"),[9] the Supreme Court of Nigeria legitimised the *Mareva* injunction, though on the facts of the case, the court did not think it was appropriate to grant a *Mareva* injunction.

Interestingly, although the decision of the Supreme Court was unanimous in dismissing the plaintiff-appellant's case, Uwais JSC (as he then was), with whom two other Justices of the Supreme Court simply concurred, treated the plaintiff-appellant's case as one involving an interlocutory injunction, and applied the principles relating to the grant of interlocutory injunction. It was Nnaemeka-Agu JSC and Omo JSC in their concurring judgments who qualified the plaintiff-appellant's case as one involving a *Mareva* injunction.

Nnaemeka-Agu JSC made reference to Section 18(1) of the then High Court of Lagos Civil Procedure Rules, which provides that "[t]he High Court may grant an injunction by an interlocutory order in all cases in which it appears to the Court to be just and convenient to do so"; and Section 13 (of the then High Court of Lagos State Civil Procedure Rules), which provides that "subject to the express provisions of any enactment, in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court concurrently and in the same manner as they are administered by the High Court of Justice in England." He was of the view that these provisions enabled a court in Nigeria to apply the principles of a *Mareva* injunction. The learned Justice provided the criteria to grant a *Mareva* injunction when he held that:

"Now, all decided cases on the point show that the Courts are ever conscious of the fact that because of its very nature, Mareva injunctions could be open to abuses. So they have evolved some rules and principles which are designed to guard against such abuses. By these rules, before a Mareva injunction could be granted the applicant must show:-

(i) that he has a cause of action against the defendant which is justiciable in Nigeria:[10] See – *Siskina (Owners of Cargo lately laden on borad) v distas Compania S.A* (1979) A.C 210;

(ii) that there is a real and imminent risk of the defendant removing his assets from jurisdiction and thereby rendering nugatory any judgment which the plaintiff may obtain: See – *Barclay-Johnson v. Ynill*(1980) 1 WLR 1259, at p.1264: also –*Rahman (Prince Abdul) him Turki al Sudiary v Abu-Taha*(1980) 1 WLR 1268, at p.1272;

(iii) that the applicant has made a full disclosure of all material facts relevant to the application: see – *Negocios Del Mar SA v. Doric Shipping Corp. SA. (The Assios)* (1979) 1 LI. Rep. 331;

(iv) that he has given full particulars of the assets within the jurisdiction;

(v) that the balance of convenience is on the side of the applicant; and

(vi) that he is prepared to give an undertaking as to damages.

If he fails to satisfy the Court in any of these preconditions for a grant of a Mareva injunction, it ought not to be granted."[11]

Nnaemeka-Agu JSC's concurring judgment in *Sotuminu* has become the standard test for the application of *Mareva* injunction in Nigeria. However, it was not obvious whether this test provided by Nnaemeka Agu JSC was strict.

In the recent case of *Haladu v Access Bank,* (*Haladu*)[12] the Court of Appeal (Ojo JCA) interpreted the Supreme Court's decision (Nnaemeka Agu JSC) in *Sotuminu* as follows:

"The apex court in the above case has stated clearly the conditions that must be met for the grant of a Mareva Injunction. In other words, they are pre-conditions that must be met. To my mind, the conditions are of strict liability. It follows therefore that an applicant who seeks an order of Mareva Injunction must place sufficient materials before the court upon which it can exercise its discretion."[13]

In the instant case, the applicant's case failed at the Court of Appeal because it failed to provide an undertaking as to damages in its application for *Mareva* injunction, and did not sufficiently prove that the defendant intends to remove its asset in Nigerian banks to a foreign country.[14]

The take away of *Haladu* is that an applicant that wants to obtain a *Mareva*

injunction in Nigeria has to be thorough, hardworking, and diligent in its case. All the conditions for the grant of *Mareva* injunction as stated in Nnaemeka-Agu JSC's concurring judgment in *Sotuminu* must be met. Indeed, this is not an easy task. As stated by Ojo JCA in *Haladu,* "solid evidence" must be provided to succeed in a prayer for *Mareva* injunction. It is submitted that there is justice in this approach because if a *Mareva* injunction is granted without the right justification, it would cause great hardship to the respondent. A balance is thus struck between ensuring that a claimant should be able to reap the fruits of its judgment, and on the other hand the defendant should not be subjected to great hardship by a wrongful grant of *Mareva* injunction. *Haladu's* case demonstrates that Nigerian law tilts more towards the side of the defendant as a matter of evidence and procedure.

[1]See Omo JSC in *Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990 approving the English case of *Z Ltd v AZ and AA-LL* (1982) 2 QB 558, 584-6.

[2](1980) 1 All ER 213.

[3]See generally *Dangabar v Federal Republic of Nigeria* (2012) LPELR-19732 (CA).

[4]"I know of no case where, because it was highly improbable that if the action were brought to a hearing the plaintiff could establish that a debt was due to him from the defendant, the defendant has been ordered to give security until that has been established by the judgment or decree." – *Lister & Co v Stubbs* (1886-90)] All ER Rep 797, 799 (Cotton LJ).

[5]*Nippon Yusen Kaisha v Karageorgis* (1975) 3 All ER 282.

[6]*Cf. Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990 (Nnaemeka-Agu JSC); *Adeyemi Durojaiye v Continental Feeders (Nig) Limited* (2001) LPELR-CA/L/445/99 (Aderemi JCA, as he then was).

[7]*Owners of Cargo Lately Laden on Board the Siskina v Distos Compania Naveria*

SA (1979) AC 210.

[8] AJ Moran and AJ Kennedy, *Commercial Litigation in Anglophone Africa* (Cape Town, Juta and Company (Pty) Ltd, 2018) at 47–50, 87.

[9](1992) LPELR-SC 55/1990.

[10]The original judgment contains "in England". We have substituted it with the phrase "in Nigeria" to appropriately suit the Nigerian context.

[11]*Sotuminu v Ocean Steamship (Nig) Ltd* (1992) LPELR-SC 55/1990. See also *AIC LTD v. NNPC* (2005) LPELR-6 (SC) 33-4 (Edozie JSC); *Extraction System And Commodity Services Ltd. v. Nigbel Merchant Bank Ltd.*(2005) 7 NWLR (Pt. 924) 215; *R Benkay (Nig.) Ltd v Cadbury (Nig) Plc* (2006) 6 NWLR (Pt. 976)338; *International Finance Corporation v DSNL Offshore Ltd* (2007) LPELR-5140(CA) 12-3 (Rhodes Vivour JCA (as he then was); *Union Bank of Nig. Plc v. Pam* (2016) 14 NWLR (Pt. 1533) 400; *Haladu v Access Bank* (2021) 13 NWLR (Pt. 1794) 434. The Nigerian Court of Appeal has granted Mareva injunction in some cases : *Adeyemi Durojaiye v Continental Feeders (Nig) Ltd* (2001) LPELR-CA/L/445/99; *Compact Manifold and Energy Services Ltd v West Africa Supply Vessels Services Ltd* (2017) LPELR-43537 (CA). See also *AIC Ltd v Edo State Government* (2016) LPELR-40132 (CA).

[12] (2021) 13 NWLR (Pt. 1794) 434.

[13] *Haladu v Access Bank* (2021) 13 NWLR (Pt. 1794) 434, 458.

[14] ibid.