

Appraisal of Mareva Injunction as an Equitable Preemptive Remedy in Debt Recovery in Nigeria*

Abstract

Litigation is often time consuming and expensive. Cases can be in court sometimes for over ten years or more. Commercial litigation cannot absorb such delay. Speed and efficacy are becoming the criteria by which success in commercial litigation most especially debt recovery is to be judged, as legal practice is forced to match the ever increasing vigour of the commercial place. Many debtors are known to dissipate their assets both movable and immovable when they are threatened with litigation such that in the event of court judgment, the creditors are left with nothing to fall back on, thereby leaving the court's judgment unenforceable. To prevent a situation like this, the English courts have developed the law to take care of the interests of creditors. A Mareva Injunction prevents the injustice of defendant/debtor from taking away his property or assets from the jurisdiction of the court, which assets might otherwise have been able to satisfy a judgment.

1. Introduction

Mareva Injunction (Interim attachment of property) is a kind of interlocutory injunction. A creditor suing for debt due and owing can apply for and obtain this injunction against a defendant debtor, who is not within the country, but has assets in it. The Mareva injunction would restrain the defendant debtor from removing the assets from the country or disposing of them within the country. The purpose of such an injunction is to ensure that these assets would be available to satisfy, if necessary, by means of execution being levied on them, any judgment the plaintiff may obtain the action against the defendant'. It is a maxim of equity that "Equity, like nature, does nothing in vain". Therefore, every court of law in Nigeria, being also a court of equity, would not make empty or unenforceable orders, on the ground that what would have been used to satisfy the order had been removed outside the court's jurisdiction by the judgment debtor before the judgment was handed down. Accordingly, once the plaintiff discovers that the defendant is about to remove his property out of the jurisdiction of the court in order to make the court's judgment unenforceable, the plaintiff can apply to the court for an order of interim attachment of such property (Mareva injunction), pending the final determination of the suit.

2. The Genesis of Mareva Injunction

Instructively, that the scope of what is popularly known as Mareva Injunction was novel even to the English until about three and half decades ago. In the case of *Nippon Yusen Kaisha v Karageorgis & Ano*,¹ where the erudite Lord Denning MR aptly stated thus:

We are told that an injunction of this kind has never been granted before. It has never been the practice of the English courts to seize assets of a defendant in advance of judgment or to restrain the disposal of them. We are told that Chapman J. in chambers recently refused such an application. In this case also Donalson J. refused it. We know, of course, that the practice on the continent of Europe is different. It seems to me that the time has come when we should revise our practice...two days ago we granted an injunction ex-parte and we should continue it.

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¹ (1975) IWLR 1093 at 1094 – 1095

Invariably, the genesis of name “Mareva” is traceable to the locus classicus *Mareva Compania Naviera. A.V. International Bulkcarriers S.A*² to the effect thus:

If it appears that the debt is due and owing and there is a danger that the debtor may dispose of his assets so as to defeat it before judgment, the court has jurisdiction in a proper case to grant an interlocutory judgment so as to prevent him disposing of those assets. It seems to me that this is a proper case for exercise of this jurisdiction.

In the Nigerian case of *Sotuminu v Ocean Steamship (Nig) Ltd*,³ plaintiff/appellant had, *inter alia*, prayed the High Court of Lagos State to issue a Mareva Injunction against one of the defendants, a non-Nigerian. When the case came on appeal to the Supreme Court, the issue whether the High Court can grant a Mareva Injunction was raised. Nnaemeka Agu JSC, (as he then was) after referring to sections 10, 13 and 18 of the High Court Law of Lagos State concluded that the High Court had jurisdiction and power to entertain and, in appropriate cases, grant a Mareva Injunction as was developed by the High Court of Justice of England.

3. Principles Guiding the Grant of Mareva Injunction

There are principles guiding the grant of this kind of injunction. In the Nigerian case of *Akingbola Chairman, EFCC*⁴ Saulawa, JCA laid down the guiding principles in tandem with the case of *IFC v DSNL Offshore Ltd*.⁵ as follows:

- i. There must be a justifiable cause of action against the defendant;
- ii. There must be a real and imminent risk of the defendant removing his assets from jurisdiction of court and thereby rendering nugatory any judgment which the plaintiff may obtain;
- iii. The applicant must make a full disclosure of all material facts relevant to the application;
- iv. The application must give full particulars of the assets within jurisdiction;
- v. The balance of convenience must be on the side of the applicant; and
- vi. The applicant must be prepared to give an undertaking as to damages.

The requirement for full and frank disclosure comes from equity as he who must come to equity must come with clean hands.

4. The Essence of Mareva Injunction

A Mareva Injunction is a preservatory order. It prevents the dissipation or dealing with properties (ending the determination of a dispute) that could render the judgment of a court or the resolution of that dispute nugatory. They therefore operate until the determination of the civil rights and obligations of the parties with regard to the subject properties.⁶ In this regard, the factors that ought to be borne in mind in Mareva injunction applications are that the application should be made *ex-parte*. This is absolutely so, because secrecy from the defendant is most fundamental; and the application should be made expeditiously with dispatch.

² (1975) 2 Lloyd’s Report 509 per Lord Denning, MR at 510

³ (1992) 5 NWLR Part 239, 1 at 25B – H per Nnaemeka-Ago, JSC; See also the case of *Durojaiye v. Continental Feeders (Nig). Ltd* (2001) 10 NWLR Part 722, 657; *Efe Finance Holdings Ltd. v. Osagie Okeke Otegbola & Co.* (2000) 5 NWLR Part 658, 536; *A.I.C. Ltd V.N.N.P.C.* (2005) 11 NWLR Part 937, 563

⁴ (2012) 9 NWLR Part 1306, 475 CA

⁵ (2008) 7 NWLR Part 1087, 592 at 601H – 602A

⁶ See *7 – Up Bottling Co. Ltd v. Abiola & Sons (Nig)* (1995) 3 NWLR Part 383, 257

5. Mareva Injunction and Right to Fair Hearing

With respect to the right to a citizen to fair hearing as enshrined in s. 36(1) & (3) of 1999 Constitution, and on whether the grant of Mareva Injunction infringes on this right, since the application is always made ex-parte, Akaahs, JCA (delivering the Leading Judgment) in the case of *Akingbola v Chairman EFCC*⁷ said..... it is necessary to state at the onset that the application which the lower court heard ex-parte was for the grant of a Mareva injunction which is a preservatory order. Consequently the granting of the ex-parte order for the preservation of the properties which was done in open court did not infringe on the appellant's right to fair hearing as enshrined in section on section 36(1) and (3) of the Constitution. In *7-up Bottling Company Ltd. V Abiola & Sons Ltd*⁸ Adio, JSC stated at page 277B, G, H thus:

In the present case, the motion ex-parte was for an interim injunction restraining the appellants of the respondents... if, as if was in this case, the Learned Judge could not properly determine any contentious issue when the motion ex-parte for an order of interim injunction came before him, the question of giving an opportunity of being heard to the appellants before determining the application could not arise and the provisions of section 33(1) of the Constitution were not applicable, and therefore were not not violated.

In his own contributions, Uwais, JSC (as he then was) elaborated at page 280D, F as follows:

In both criminal and civil proceedings there are certain steps to be taken which are incident or preliminary to the substantive case such steps include motions for direction, interim or interlocutory injunction...it is in respect to such cases that provisions are made in court rules to enable the party affected to or likely to be affected to make ex-parte applications. The orders to be made by the court, unlike final decisions, are temporary in nature, so that they do not determine the "Civil rights and obligations" of the parties in the proceedings as envisaged by the Constitution.

For that reason, in *Akingbola's* case, at the time the respondent applied for the ex-parte Mareva injunction, the appellant was still at large as he had not been arrested. It was alleged that he was evading arrest and had abandoned his home and absconded from the country with large sums of money. The respondent had expressed the fear that the assets listed in the schedule for the ex-parte Mareva injunction could be frittered away, dissipated, disposed of or removed from the long arm of the law if the injunction was not granted. At the time the appellant was charged to court, he was still at large and it was only after the court granted the ex-parte Mareva injunction that he surfaced. The contention that the hearing of the ex-parte motion offended the appellant's right to fair hearing as enshrined in s. 36(1) 7 (3) of 1999 Constitution had therefore overlooked the fact that the appellant was not around to exercise the right and if the respondent waited for him to appear before taking the necessary precaution to safeguard the assets, the likelihood of the plaintiff interfering with the assets could not be ruled out. The orders granted by the court cannot be declared null and void simply because they were not conducted in open court. For the same reason that the appellant had evaded arrest and had been charged to court in absentia. Furthermore, in the case of *Kigo (Nig) Ltd. v Holman Brothers*⁹, the Supreme Court held that the high court has the jurisdiction and powers to make orders especially preservatory orders to affect another suit and or pending the determination of another suit.

⁷ (n 4)

⁸ (1995) 3 NWLR Part 383, 257

⁹ (1980) 12 NSCC 204 at 210

6. Conclusion

This is an equitable legal framework developed to prevent the injustice of a defendant taking away his property or assets from the jurisdiction of the court, which assets might otherwise have been able to satisfy a judgment. Also, it is a trite law that no injunction obtained ex-parte should stand if it had been obtained in circumstances in which there had been a breach of duty to make the fullest and frankest disclosure. Therefore, where the applicant did not make the fullest possible disclosure he would be deprived of any advantage he might have obtained by means of the order. It is worthy to note that absence of full and frank disclosure can result on the discharge of a Mareva Injunction. Indeed, thus is a remarkable development in our legal system being a preservatory order which our court ought to apply when the justice so demand and not to be abuse. It also a welcome development in our legal jurisprudence.

