

Nigeria: Legal Regime For The Enforcement of Foreign Judgements in Nigeria: An Overview

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Abstract

This paper seeks to examine the mechanisms through which foreign judgments are enforced in Nigeria. It also examines some of the prevailing issues that have recurred in the Nigerian courts as relates to the recognition and enforcement of foreign judgments.

Introduction

It is generally accepted that the powers of the courts are limited by their territorial boundaries (i.e. territorial jurisdiction). Thus a judgment pronounced by the court of one jurisdiction may have no force or effect beyond its own territory save for situations where other jurisdictions have agreed to allow such judgment enforceability within their own territories.

Two schools of thought have emerged over the years as rationalization for the recognition and enforcement of foreign judgments¹. These are the theories of **reciprocity** and **obligation**.

The theory of **reciprocity** posits that the courts of country X should recognise and enforce the judgment of country Y, if and only if, country Y is prepared to offer similar recognition and enforcement to the judgments of country X.

The doctrine of **obligation**, on the other hand, came into prominence in the 19th century and was put forward by Blackburn J. in **Schibsby v. Westenholz**² as follows:

"We think that ... the true principles on which the judgments of foreign tribunals are enforced in England is ... that the judgment of a court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts in this country are bound to enforce; and any thing which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action."

Legal Regime Regulating Enforcement of Foreign Judgments in Nigeria

There are two statutes regulating enforcement of foreign judgments in Nigeria viz:

- **Reciprocal Enforcement of Foreign Judgments Ordinance, Cap 175, Laws of the Federation of Nigeria and Lagos, 1958** ("the 1958 Ordinance) (this Ordinance was enacted in 1922 as L.N. 8, 1922).
- **Foreign Judgments (Reciprocal Enforcement) Act, Cap 152, Laws of the Federation of Nigeria, 1990** ("the 1990 Act') (enacted in 1961 as L.N. 56, 1961)

There has been until recently, intense intellectual polemics amongst text writers, commentators and legal practitioners as to which of these two statutes regulates the enforcement of foreign judgments in Nigeria.

This confusion emerged as a result of various judgments of the High Court which mostly applied the 1990 Act, the Common Law Rules of Private International Law (or conflict of laws) and, in extreme cases, the Evidence Act, Cap 112, Laws of the Federation of Nigeria, 1990.

A few of these cases which later went on appeal are discussed below.

In **Dale Power Systems Plc v. Witt & Bush Ltd**,³ the trial High Court had applied the provisions of the 1990 Act in registering the foreign judgment. On appeal, one of the issues raised before the Court of Appeal was whether the 1958 Ordinance was the applicable legislation as regards the registration a foreign judgment obtained from the High Court of Justice in England. The Court held that the trial court was in error in applying the 1990 Act and that the 1958 Ordinance was the applicable legislation.

In the case of **Halaoui v. Grosvenor Casinos Limited**,⁴ an application was made to the High Court to set aside the registration of a foreign judgment for non compliance with the provisions of sections 6(2) of the 1990 Act. The High Court, relying on sections 73, 74(1) (m) and 135(2) of the Evidence Act, declined to set aside the registration of the judgment. On appeal, the Court of Appeal in setting aside the judgment of the High Court held that the relevant statute was the 1990 Act and the **Evidence Act and the common law were inapplicable** for the enforcement of foreign judgments in Nigeria. In **Halaoui supra**, the Court of Appeal was silent on the issue of the applicability of the 1958 Ordinance. This would however seem to be due to the fact that it was not canvassed before that court by any of the parties.

It is submitted however that much of the confusion on the applicable law regulating the enforcement of foreign judgments has arisen from a misinterpretation of the provisions of section 9(1) of the 1990 Act which provides thus:

9(1) This part of this Act shall apply to any part of the Commonwealth other than Nigeria and to the judgments obtained in the courts thereof as it applies to foreign countries and judgments obtained in the courts of foreign countries, and the Reciprocal Enforcement of Judgments Ordinance shall cease to have effect except in relation to those parts of Her Majesty's Dominion other than Nigeria to which it extended at the date of the commencement of this Act.

From the above provision, it would seem that the 1958 Ordinance applies only to the extent that the Minister of Justice has not made an order pursuant to section 3(1) of the 1990 Act extending the said Act to the United Kingdom and other foreign countries. Thus when the Minister makes such an enactment the 1958 Ordinance will become inapplicable.

The above view is buttressed by the decision of the Court of Appeal as approved by the Supreme Court in **Macaulay v. R.Z.B., Austria**⁵ where it was held that the interpretation of Section 9 of the 1990 Act made the 1958 Ordinance applicable in the enforcement of foreign judgments in Nigeria but only to the extent that the Minister of Justice had not made any order under 3(1) of the 1990 Act extending that Act to the United Kingdom and other foreign countries⁶.

What Judgments are Registrable

In order for a foreign judgment to be enforceable in Nigeria, it must be pronounced by a **superior court of the country of the original court**. This applies to both civil proceedings (including awards in arbitration proceedings) and judgments given in criminal proceedings for the payment of money in respect of compensation or damages to an injured party.⁷

To **qualify** for registration, the foreign judgment must be a **money judgment**.⁸ The judgment must be for a sum certain. A sum is sufficiently certain for this purpose if it can be ascertained by a simple arithmetical process.⁹

Additionally, the judgment must be **final and conclusive** as between the parties thereto.¹⁰ In other words, it must settle the rights and liabilities of the parties so as to be *res judicata* in the country in which it was given. As Lord Herschell put it:

"It must be shown that the court in which it was produced, it conclusively, finally and forever established the existence of the debt which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties."¹¹

Thus *interim or interlocutory and default judgments* that do not finally and conclusively determine the rights and liabilities of the parties are not registrable. Also a judgment which is capable of being *varied or rescinded* by the court that gave it is not registrable.¹²

The onus of proof that the judgment is final and conclusive is on the party who so asserts.¹³ However, a judgment shall be **deemed** to be final and conclusive despite the fact that an appeal is pending against it or that it may still be subject to an appeal in the foreign country in which it was pronounced.¹⁴

Similarly, judgments of a **non monetary** nature such as **declarations** regarding an existing state of affairs and **injunctions** either directing or prohibiting a person from doing a particular thing (other than the payment of money) are not registrable. Judgments directing payment of taxes, revenues and penalties¹⁵, judgments in criminal proceedings imposing terms of imprisonment or fines are also excluded from being registered. A judgment shall also not be registered if at the date of the application for registration the judgment has been wholly satisfied (paid) by the judgment debtor or if the judgment could not be enforced by execution in the original court.¹⁶ This will cover cases of declaratory judgments which by their very nature are incapable of enforcement.

To be registrable, the sum payable under the judgment must be expressed in Naira. If the judgment sum is expressed in a currency other than the Naira, the law requires the sum to be converted into the Naira at the rate of exchange prevailing at the date of judgment.¹⁷

If at the date of the application for registration, the judgment of the original court has been partly satisfied, the judgment will be registered in respect of the balance due only and not the whole sum.¹⁸

Effect of Registration of the Foreign Judgment

For the purposes of execution, a registered judgment has the same force and effect as the original judgment and proceedings may be taken on it. The judgment sum carries interest, and the registering

court has the same control over execution, as if the registered judgment had been one originally given by the registering court and entered on the date of registration.¹⁹

Respective Duties of the Original Court and the Registering Court

In *Adwork Ltd. v. Nigeria Airways Ltd*²⁰, the Court of Appeal, held that the **registering** court **cannot sit on appeal** over the judgment of a foreign court.

Execution shall not be issued on a registered judgment where an application has been made to set aside the registration.

Setting Aside of Registered Judgments

According to the 1990 Act an order for the registration of a foreign judgment **shall be set aside**, on an application of the person against whom a foreign judgment is registered, if the registering court is satisfied that:

- i. the judgment is not a judgment to which Part I of the 1990 Act applies²¹; or
- ii. the courts of the country of the original court had no jurisdiction in the circumstances of the case²²; or
- iii. that the judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him defend and did not appear²³; or
- iv. the judgment was obtained by fraud²⁴; or
- v. enforcement of the judgment would be contrary to the public policy of Nigeria²⁵; or
- vi. the rights under the judgment are not vested in the person who applied for registration²⁶.

The judgment **may** also be set aside if ‘...the registering court is satisfied that the matter in dispute in the proceedings in the original court had previously to the date of the judgment in the original court been the subject of a final and conclusive judgment by a court having jurisdiction in the matter²⁷

We will now briefly consider each of the foregoing requirements.

The registration of the foreign judgment would be set aside if it is not a judgment to which Part I of the Act Applies.

The judgments to which Part I of the 1990 Act applies are money judgments which must be final and conclusive (see footnotes 7-17 supra)

The registration of the judgment would be set aside if the courts of the country of the original court had no jurisdiction in the circumstances of the case

For the purpose of an **application to set aside** the registration of a foreign judgment, a foreign court is **deemed** to have had jurisdiction in an action *in personam* (a personal action), if the judgment debtor who was the defendant in that court:

- i. submitted to the jurisdiction of that court by voluntarily appearing in the proceedings, (he would not be taken to have submitted to the jurisdiction of the court if his appearance is merely to contest the jurisdiction of the court²⁸, protecting or obtaining the release of property seized or threatened with seizure in the proceedings²⁹; or
- ii. was plaintiff in, or counter-claimed in, the proceedings in the original court³⁰; or
- iii. had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings, to submit to the jurisdiction of the court or of the courts of the country of that court³¹; or
- iv. was, when the proceedings were instituted, resident in, or, being a body corporate, had its principal place of business in, the country of that court³²; or
- v. had an office or place of business in the country of that court and the proceedings in that court were in respect of a transaction effected through or at that office or place³³.

In an action in which the subject matter was immovable property, or in an action in *rem* of which the subject matter was movable property, the foreign court is deemed to have jurisdiction if, at the time of the proceedings, the property in question was situated in the country of that court³⁴.

In the case of a judgment given in an action other than those aforesaid, the original court is deemed to have jurisdiction if its jurisdiction is recognized by the registering court³⁵.

Submission to Jurisdiction

A foreign judgment will be enforced in Nigeria if the judgment debtor submitted to the jurisdiction of the foreign court. Submission to jurisdiction usually takes many forms. A defendant would be taken to have submitted to the jurisdiction of the foreign court if he files an unconditional appearance, when he moved the court to set aside a default judgment and at the same time applied for an order that the plaintiff deliver a statement of claim and when he applied for an order for security for cost³⁶. It is instructive to note that most of the cases involving applications to set aside a registered foreign judgment are cases in which the judgment debtor disputed the fact of his having submitted to the jurisdiction of the court.

In *Halaoui supra*, on an application to set aside the registration of the foreign judgment, it was held that although the originating processes of the original court was served on the defendant in Nigeria, he did not enter an appearance to the proceedings in England. It was further held that the defendant did not submit to the jurisdiction of the English Court, and therefore, the English court had no jurisdiction over the defendant. The registration of the judgment was thus set aside.

In *Dale Power Systems Plc*³⁷, the defendant filed process acknowledging service of the writ of summons, filed a statement of defence and appealed against the judgment and lost. In the circumstances, it was held, on an application to set aside the foreign judgment, that he had voluntarily submitted to the jurisdiction of the English court and consequently that court had jurisdiction over him. What can be discerned from these cases is that the actual **purpose** of the appearance rather than the **form** it takes is what really matters.

If the defendant is constrained by **local procedure**³⁸ to enter a defence on the merits at the same time he enters a challenge to jurisdiction, he will be entitled to argue that he did not submit to the jurisdiction of the foreign court. But if the entry of a defence is not required at the same time as the challenge to the jurisdiction, it is open to the court to conclude that, by entering it, he did submit to the jurisdiction of the foreign court³⁹.

The judgment debtor, being the defendant in the proceedings in the original court, did not receive notice of those proceedings in sufficient time to enable him defend and did not appear

This is notwithstanding that the process may have been duly served on the defendant in accordance with the law of the country of the foreign court. In *Hyppolite v. Egharevba*⁴⁰, the Court of Appeal set aside the registration of the foreign judgment on the ground that one of the court processes leading to the judgment was not served on the judgment creditor.

The judgment was obtained by fraud

Registration of a foreign judgment which has been obtained by fraud in the country of the original court will, on an application duly made in that behalf by the defendant be set aside by the registering court⁴¹.

Enforcement of the judgment would be contrary to the public policy of Nigeria

In *Dale Power Systems Plc, supra*, public policy was defined as "community sense and common conscience extended and applied through out the State to matters of public morals, health, safety, welfare and the like." In stating that the trial court was wrong to set aside the registered foreign judgment on the ground that the subject matter of the foreign judgment offends Nigeria public policy, the court held that it is not contrary to public policy in Nigeria to enforce a foreign judgment against a Nigerian company which has obtained goods on credit from a foreign company but has failed to honor its obligation to pay for them and does not deny the existence of the liability to pay same and it does not matter that the foreign company involved was once a shareholder of the Nigerian company.

Ramon v. Jihad, supra, is a case which clearly exemplifies the proposition of law that a registration of foreign judgment will be set aside if the registration offends public policy in Nigeria. In that case, the parties carried out foreign exchange transactions outside Nigeria (in England) without the permission of the Minister as prescribed by section 3(1) (2) of the Exchange Control Act of 1962. The court declined registration of the judgment on the ground that the transaction giving rise to the judgment was illegal in Nigeria.

Situations in which a foreign court shall not be deemed to have had Jurisdiction

For the purposes of an application to set aside the registration of a foreign judgment, the courts of the country of the original court are **deemed not to have had jurisdiction**:

- a. if the subject matter of the proceedings was **immovable property situated outside** the foreign country⁴²; or
- b. where the proceedings are brought before it in **breach of an agreement for the settlement of disputes** (this covers breaches of arbitration or jurisdiction clauses in contracts and agreement)⁴³; or

- c. if the judgment debtor, being a defendant in the original proceedings was a **person** who, under the rules of **public international law**, was entitled to **immunity** from the jurisdiction of the courts of the country of the foreign court and did not submit to the jurisdiction of that court⁴⁴.

Power of the Registering Court on Application to Set Aside Registration

If, on an application to set aside the registration of a judgment the applicant **satisfies** the registering court **either that an appeal is pending, or that he is entitled and intends to appeal, against the judgment**, the court, if it thinks fit, may, on such terms as it may think just, either set aside the registration or adjourn the application to set aside the registration **until after the expiration of such period as appears to the court to be reasonably sufficient to enable the applicant take the necessary steps to have the appeal disposed of** by the competent tribunal⁴⁵.

Where registration of the judgment is set aside for the foregoing reason, or **solely** on the ground that the judgment was not at the date of the application for registration enforceable by execution in the country of the original court, the setting aside of the registration **shall not be a bar to the bringing of a further application to register the judgment when the appeal has been disposed of or if and when the judgment becomes enforceable in that country** as the case may be⁴⁶.

As regards countries which have the reciprocity agreement with Nigeria, no proceedings for the recovery of a sum payable under a foreign judgment other than proceedings by way of registration of the foreign judgment can be entertained.

A person, who has obtained judgment in a foreign country, being a country which accords judgments given by the High Courts of Nigeria reciprocity, is estopped from **suing on the original cause of action** that was the subject matter of litigation in the foreign court.

This principle is based on a public policy consideration to the effect that it is for the common good that there must be an end to litigation (*interest rei publicae ut sit finis litum*).

Non Reciprocal Judgments

So what fate awaits foreign judgments obtained in countries that **do not assure substantial reciprocity as regards the enforcement of judgments given by Nigerian courts?**

It has been suggested that where it is **impossible** to obtain registration of a foreign judgment in Nigeria for **want of reciprocity, Common law becomes applicable** and the judgment creditor may use the foreign judgment to **procure a judgment in Nigeria by instituting a fresh action**⁴⁷. The reasoning behind this is that just as Common law has not ceased to apply in spite of the many statutes and Conventions regulating the enforcement of foreign judgments in England, both the 1958 Ordinance and the 1990 Act cannot operate to the exclusion of Common law.

It is therefore difficult to see how the common law would apply in Nigeria to countries whose superior courts do not recognize and enforce judgments given by Nigerian courts. Indeed, the section 12 manifests a clear intention on the part of the legislature to render any judgment pronounced by a court of a foreign country which does not give due recognition to judgments delivered by Nigerian courts unenforceable in Nigeria under any guise whatsoever

Conclusion

From the foregoing, it is quite clear that both the 1958 Ordinance and the 1990 Act still have their separate spheres of applicability.

Whilst the 1958 Ordinance applies to Commonwealth countries, the 1990 Act is applicable to judgments in respect of which the Minister of Justice has made an order to that effect pursuant to section 3(1) of the 1990 enactment. It is however worthy of note that the Minister is yet to make any such order extending the provisions of Part 1 of the 1990 Act to other countries outside of the commonwealth. This is so because such an 'order' can only be made to cover a country which offers reciprocal treatment to the judgments of Nigerian courts.

Footnotes

1. For a detailed discussion of the various theories, see: Smith's Conflict of Laws, 2nd Edition by John O'brien pages 263 – 264.

2. (1870) LR 6 QB 155 at p. 159. The doctrine was approved in Adams v. Cape Industries Plc (1990) Ch. 433.

3. (2001) 8 NWLR (Pt. 716) 699

4. (2002) 17 NWLR (Pt. 795) 28

5. (2003) 18 NWLR (Pt.852) 282.

6. per the speech of Kalgo JSC at 296F – 298F and the concurring speech of Uwaifo JSC at 320E – 303F

7. Section 2(1), Foreign Judgments (Reciprocal Enforcement) Act, Cap 152, Laws of the Federation of Nigeria, 1990.

8. Section 3(2)(b) of the 1990 Act

9. Beatty v. Beatty (1924) 1 KB 807, CA

10. Section 3(2)(a)

11. Nouvion v. Freeman (1889) 15 AC 1 at p.9; Per Lord Branwell at P. 14.

12. *Ibid*

13. Carl Zeiss Stiftung v. Rayner & Keller Ltd. (1966) 2 All ER 536 at 555, 556, 587

14. Section 3(3) of the 1990 Act.
15. Section 3(2)(b) of the 1990 Act
16. proviso to section 4 of the 1990 Act.
17. Section 4(3) of the 1990 Act.
18. Section 4(4) and section 7(4) of the 1990 Act.
19. Section 4(2),(a),(b),(c),(d) of the 1990 Act; Section 3(3),(a),(b),(c) of the 1958 Ordinance; Halsbury's Laws of England 4th Edition (Reissue) Vol. 8(3) paragraph 174 at p.156; Ferdinand Wagner (a firm) v. Laubscher Brothers & Co (1970) 2 All ER 174 at 175; Adwork Ltd. v. Nigeria Airways Ltd. (2000) 2 NWLR (Pt. 645) 415 at 429G – 430D
20. See note 32 *ante*
21. section 6(1)(a)(i) of the 1990 Act
22. section 6(1)(a)(ii) of the 1990 Act
23. section 6(1)(a)(iii) of the 1990 Act
24. section 6(1)(a)(iv) of the 1990 Act
25. section 6(1)(a)(v) of the 1990 Act
26. section 6(1)(a)(vi) of the 1990 Act; See generally Halsbury's Laws of England 4th Edition (Reissue) Vol. 8(3) paragraph 176 at p.157
27. section 6(1)(b) of the 1990 Act
28. Re Dulles' Settlement (No.2)(1951) Ch. 842 C.A
29. Section 6(2)(a)(i) of the 1990 Act
30. Section 6(2)(a)(ii) of the 1990 Act
31. Section 6(2)(a)(iii) of the 1990 Act
32. Section 6(2)(a)(iv) of the 1990 Act, Schibsy v. Westenholz note 4 *ante*, Hyppolite v. Egharevba (1998) 11 NWLR (Pt. 575) 598 at 612 paragraphs A-B
33. Section 6(2)(a)(v) of the 1990 Act; Hyppolite v. Egharevba (1998) 11 NWLR (Pt.575) 598 at 613F – 614C; Sharps Commercial Ltd v. Gas Turbines Ltd. (1956) N.Z.L.R 819; See: Halsbury's Laws of England 4th Edition (Reissue) Vol. 8(3) paragraph 177 at p.158
34. Section 6(2)(b) of the 1990 Act
35. Section 6(2)(c) of the 1990 Act
36. Dicey and Morris, the Conflict of Laws 3rd Edition Vol. 1 page 191
37. See note 4 *ante*
38. Eg. Order 25(1) and of the Federal High Court (Civil Procedure) Rules, 2000
39. Marc Rich & Co AG v. Societa Italiana PA, The Atlantic Emperor (No.2) 1 Lloyd's Rep 624, CA; Halsbury's Laws of England 4th Edition (Reissue) Vol. 8(3) paragraph 144 at p.134
40. See note 46 *ante*
41. Syal v. Heyward (1948) 2 KB 443, (1948) 2 All ER 576.
42. Section 6(3)(a) of the 1990 Act
43. Section 6(3)(b) of the 1990 Act
44. Section 6(3)(c) of the 1990 Act
45. section 7(1) of the 1990 Act
46. section 7(1) of the 1990 Act
47. article on "cross border insolvency" published on the internet. Author Unknown.