



CAUSES OF ACTION AND LIMITATION OF ACTION FOR DEBT RECOVERY

*Kathleen Okafor

Baze University, Abuja, Nigeria

Received 18th November 2021; Accepted 12th December 2021; Published online 30th January 2022

Abstract

Increasingly, economies and business depend on debt for growth and sustenance. The initiation of debt recovery process and the legal architecture of the entire process of debt recovery became critical to harmonious business continuity and for mutual benefit to creditor and debtor. Loans, overdraft and other credit facilities need to be streamlined and lawyers, law students, judges, debt recovery institution's need to be properly guided as funds are the engine of businesses and national economies.

Keywords: Histology of debt recovery, authoritarianism, dispute. Ex parte, holistic, eligible bank asset, prudential guidelines

INTRODUCTION

As economies battle variegated micro, macroeconomic headwinds like cultural and social malaise like corruption, nepotism, gender exclusivism, political authoritarianism, so the causes of debt failure/default are different. This paper analyses the histology of debt recovery, causes of loan default and the pandemic of debt recovery. An attempt has been made to analyse the use of Asset Management Corporation (AMCON) as major debt collector in Nigeria.

Accrual of Cause of Action for Debt Recovery

Undoubtedly, a cause of action for debt recovery is said to accrue when the debtor defaults in payment. This was established in the case of *Wema Bank Plc. V Alhaji Adisatu Owosho*¹. In the case of *Kolo v. F.B.N.*², the Court held that, it is trite law that in an action for the recovery of a debt the cause of action accrues upon demand for the payment of the debt. If no demand is made, a cause of action does not arise and no action can be commenced.³ In the case of *Ishola*⁴ (supra), the Supreme Court held that it is an implied term of the relationship between a banker and his customer that there should be no right of action until there has been a demand or notice given. As stated in the above authorities, it is the letter of demand from a Bank/Creditor to its customer for the payment of a debt owed in his account that gives rise to the accrual of the right of action. For the purpose of the recovery of the debt by means of the judicial process of a Court of law.⁵ Until such letter of demand is issued, no right of action would arise and accrues to the bank to enable it commence a legal action in a Court of law for the recovery of the debt in question. Consequently, since the Appellant did not write and issue a letter of demand to the Respondent for the recovery of the debt allegedly owed by her. The right of action in respect of the said debt did not accrue at the time the Appellant filed the counter-claim for the debt. It may be recalled that the law is that for the purpose of the application of a limitation law,

time would start to run from the date/time, a cause and right of action arises and accrues to a party.⁶ Since the debt did not arise from a usual or normal banker and customer relationship service of the grant of loan, overdraft or other credit facilities by the Appellant to its customer, but arose out of alleged fraud which was discovered by the Appellant in 1999, but disputed by the Respondent, it had the duty to have formally demanded for the payment of the disputed debt from the Respondent within the time prescribed by the limitation law if it intended to use the judicial processes of a Court to recover the debt. The duty of the Appellant to comply with the provisions of the limitation law in making the demand for the payment of the debt allegedly owed by the Respondent was not left at its whims and pleasure since it is a Judicial condition precedent for the exercise of the right to claim the payment by use of the judicial process of a Court of law. The statement of account after the reconciliation by the Appellant showing the indebtedness of the Respondent to the Appellant which was disputed, did not translate or constitute a demand, as required by the law, for the repayment or payment of the debt indicated thereon. If the Respondent had acknowledged the said debt when she received it, then the acknowledgement would have activated and given rise to the right of the Appellant to claim payment by the Respondent without the need to have written a formal demand for her to do so.⁷ However, for a valid and competent legal action to be initiated and maintained by the Appellant before a Court of law, a formal demand for the payment of the debt from the Appellant to the Respondent had to be made within the period of time stipulated by the limitation law of Lagos State for actions to recover such debts between the Appellant and its customer; the Respondent. Limitation Statutes or Laws being substantive and not merely procedural and technical have to be complied with in the action by the Appellant to recover the alleged debt from the Respondent.⁸ In the *Hung v. E.C. Invest. Co. Nig. Ltd*, it was

¹(2018) LPELR-43857(CA)

²*Kolo v. F.B.N.*

³(2002) LPELR-7106 (CA) @ 21, (2003) 3 NWLR (Pt. 806) 216. See *Ishola v. S.G. Bank* (1997) 2 SCNJ, 1 @ 19, also reported in (1997) 2 NWLR (Pt. 488) 405 @ 422.

⁴

⁵*Angyu v. Malami* (1992) 9 NWLR (Pt.264) 242 @ 252

⁶*Sandav. Kukawa L.G.* (supra); *Amusan v. Obideyi* (2005) 6 SC (Pt. 1) 147, (2005) 14 NWLR (Pt. 945) 322; *Ogunko v. Shelle* (2004) 6 NWLR (Pt. 868) 17; *Odubeko v. Fowler* (1993) 7 NWLR (Pt. 308) 637; *Sosan v. Ademuyiwa* (1986) 3 NWLR (Pt. 27) 241; *W.A.P.C.Plc v. Adeyeri* (2003) 12 NWLR (Pt. 835) 517.

⁷*A-G Adamawa State v. A-G Federation* (2014) LPELR-2322 (SC); *Okonta v. Egbuna* (2013) LPELR-21253 (CA).

⁸*Cross River University of Tech. (CRUTECH) v. Obeten* (2011) LPELR-4007 (CA).

held, that; In a claim for recovery of a debt, the cause of action accrues when a demand is made and the debtor refuses to pay.⁹ When several attempts to resolve the dispute amicably to obtain payment from a debtor failed, the creditor needs to present documentation e.g. delivery notes, invoices, written agreements, letters, emails, photographs, memos, etc. In the case of *Josco Ag Global Resources Limited & Anor v AMCON*¹⁰ on the duration of the substantive action in the lower Court, Counsel to the Appellant submitted that by the provisions of Paragraph 5:3 of the Practice Directions, the action in the lower Court ought to have been commenced and concluded within three months, but that the present action lasted over six months in the lower Court. Counsel stated that the lower Court ceased to have jurisdiction to adjudicate on the matter on the expiration of three months after its commencement and the judgment was therefore given without jurisdiction. Now, Paragraph 5:3 of the Practice Directions directs that a substantive action for recovery of debt should be commenced and concluded within three months. The issue of the effect of non-compliance with this provision is, however, not new and has come before the Courts. The position taken is that the jurisdiction of the trial Court to hear and determine a debt recovery action is grounded by the Constitution of the Federal Republic of Nigeria 1999, as amended, and as well as the AMCON Act and that such jurisdiction cannot be limited, robbed, taken away by Paragraph 5:3 of the Practice Directions. Thus, non-completion of an action within three months did not take away, dent or affect the jurisdiction of the trial Court to hear and determine the matter in any way.¹¹

"On the failure to commence the substantive action within fourteen days of the ex parte interim orders, Counsel to the Appellants stated that the lower Court granted the interim ex parte orders on the 17th of September, 2015 and that the Respondent, contrary to the provisions of Section 49 and 50 of the AMCON Act, failed to commence the substantive matter until the 9th of October, 2015, outside the fourteen day period stipulated in the provisions. Counsel submitted that the substantive action was thus incompetent. Section 49 of the AMCON Act reads: "1. Where the Corporation has reasonable cause to believe that a debtor or debtor company is the bona fide owner of any moveable or immovable property, it may apply to the Court by motion ex-parte for an order granting possession of the property to the Corporation. 2. The Corporation shall serve a certified true copy of the order of the Court issued pursuant to subsection (1) of this section on the debtor or debtor company. 3. The Corporation shall commence debt recovery action against the debtor or debtor company in respect of whose property an order subsists pursuant to subsection (1) of this section within 14 days from the date of the order, failing which the order shall lapse."

Section 50 of the Act reads: "1. Where the Corporation has reasonable cause to believe that a debtor or debtor company has funds in any account with any eligible financial institution, it may apply to the Court by a motion ex-parte for an order freezing the debtor or debtor company's account. 2. The Corporation shall commence debt recovery action against the debtor or debtor company whose account has been frozen by a Court order issued under Subsection (1) of this section within

14 days from the date of the order, failing which the order shall lapse." The principles of interpretation of statute are so well established that they have become elementary and rudimentary. It is trite that in interpreting a statute, the duty of a Court is to consider the words used in order to discover their ordinary meaning, and then give use their ordinary meaning as they relate to the subject matter.¹² In doing so, a Court should adopt a holistic approach and interpret the provisions dealing with a subject matter together to get the true intention of the lawmakers.¹³ The Court must also not add to or take from the provisions unless there are adequate grounds to justify the inference that the legislature intended something which it omitted to express.¹⁴ Applying these principles to the provisions of Sections 49 and 50 of the AMCON Act, it is very clear that the penalty for a failure to commence the substantive action within fourteen days of obtaining the ex parte interim orders is that the lifespan of the interim orders will lapse. It has nothing to do with the competence of the substantive action so commenced. This position is not altered by the fact that the lower Court, in making the interim order, directed the Respondent to file the substantive action within fourteen days. The directive was given in compliance with Paragraph 13:2 (3) of the Practice Directions and in furtherance of the provisions of Sections 49 and 50 of the AMCON Act. Thus, the failure of the Respondent to commence the substantive action within fourteen days of the interim ex parte did not render the substantive action incompetent. The submission of Counsel to the Appellant on the point amounted to reading words into the provisions of the Sections 49 and 50 of the AMCON Act and it was also not well founded."¹⁵

However, under the Failed Banks (Recovery of Debts) and Financial Malpractices in Banks Act, the Limitation laws do not apply. It states that "The provisions of the Limitation Law of a State or Limitation Act of the Federal Capital Territory, Abuja shall not apply to matters brought before the court under this Part of the Act". In the case of *Official Receiver and Liquidator v Moore*, the plaintiff bank had given overdraft facilities to the defendant. In an action brought by the bank to recover money outstanding on the overdrawn accounts the defendant maintained that, the claim was barred under the Statute of Limitation, since the last advance was made more than six years before.

"The provisions of the Limitation Law of a State or Limitation Act of the Federal Capital Territory, Abuja shall not apply to matters brought before the court under this Part of the Act". Also, section 35(5) of the AMCON (Amendment No. 2) Act, 2019; excludes the application of a Limitation law or act or similar statutes to a recovery of debt action commenced under the AMCON Act. The provision states that:

¹²*Merill Guaranty Savings & Loans Ltd Vs Worldgate Building Society Ltd* (2013) 1 NWLR (Pt 1336) 581, *Gbagbarighavs Toruemi* (2013) 6 NWLR (Pt 1350) 289, *Commissioner for Education, Imo State Vs Amadi* (2013) 13 NWLR (Pt 1370) 133.

¹³*Abia State University, Uturu Vs Otsosi* (2011) 1 NWLR (Pt 1229) 605, *Ayodele Vs State* (2011) 6 NWLR (Pt 1243) 309, *National Union of Road Transport Workers Vs Road Transport Employers Association of Nigeria* (2012) 10 NWLR (Pt 1307) 170, *Attorney General, Federation Vs Attorney General, Lagos State* (2013) 16 NWLR (Pt 1380) 249.

¹⁴*Attorney General, Federation Vs Attorney General, Lagos State* (2013) 16 NWLR (Pt 1380) 249, *Federal Republic of Nigeria Vs Bankole* (2014) 11 NWLR (Pt 1418) 337.

¹⁵*Per ABIRU, JCA (Pp. 45-49, paras. F-D)*

⁹(2016) LPELR-42125 (CA). *Victor v. UBA Plc. and Okonta v. Egbuna*.

¹⁰(2018) LPELR-45637 (CA)

¹¹*Asset Management Corporation of Nigeria Vs Oga Investment Co Ltd* (2017) LPELR 42004(CA), *Odejide Vs Asset Management Corporation of Nigeria* (2017) LPELR 42005(CA).

"Any statute of limitation of a state or Federal Capital Territory or any statute or rule or practice directions of any court limiting the time within which an action may be commenced does not apply or operate to bar or invalidate any claim brought by the Corporation in respect of an eligible bank asset or brought to recover a debt or enforce any security or obligation of a guarantor or surety in connection with an eligible asset".

The circumstances to the time within which an action for recovery of debt can be brought include the following:

- i. A simple contract or quasi-contract will no longer be heard by the court after the expiration of six years from the date the debt became due and actionable.
- ii. Where the debt has been resolved through alternative dispute resolution and the arbitration award delivered cannot be brought before any court after the expiration of six years from the time the cause of action arose.
- iii. A debt that arose as a penalty or forfeiture cannot be recovered through a court after the expiration of six years from the date the debt became due.
- iv. A debt owed to a company by a member (shareholder) of the company as stated in the articles of association of the company, cannot be recovered from such shareholder after the expiration of six years from the date his debt became due.
- v. An action for account or recovery of Seaman's wages cannot be allowed in any court after the expiration of six years from the date such became due.
- vi. A principal sum of money secured by a mortgage or charge on land or on any movable property (other than ship) cannot be recovered after the expiration of twelve years from the date when the right to recover such sum accrued.

Where these circumstances exist, a court will not entertain a case for debt recovery when such debt has become statute-barred. Where several attempts to resolve amicably to obtain payment, a debtor failed the creditor needs to present certain documents of delivery notes, written agreement, e-mail, photographs, memo.

In the Supreme Court of Nigeria case between *National Social Insurance Trust Fund V Klifco Nigeria Limited*¹⁶ Chukwuma-Eneh JSC contributed to this issue viz;

"What I must further state as settled law is that the Law of Limitation here has not extinguished the right to the debt; the instant debt has not been extinguished but it merely bars the right to recover the debt because of lapse of specified period of time in the law of Limitation from the accrual of cause of action. However, where there is acknowledgment of debt, which must be in writing signed by the party that is liable, the right to recover the debt by action is revived and what constitutes acknowledgment in such causes is a matter of fact in each case..."

It is elementary to state that any person who borrows money has an obligation to repay. It is only normal that the creditor should take steps to recover his money when the debtor defaults. Usually the first stage consists of writing letters requesting the debtor to satisfy his obligations, and when the debtor continues to default the creditor may take out a writ to repay the money borrowed. In *Union Bank of Nig v Penny-Mart Ltd*¹⁷, the respondent to whom a loan was granted by the appellant bank sought a declaration that his total indebtedness to the appellant was ₦308,989.17. The Court of Appeal held that the respondent as a debtor could not sue its creditor for a declaration that he was owing the creditor a certain sum. Such a claim does not disclose a cause of action as it does not reveal what wrongful act of the creditor gave the debtor his cause of complaint.

Conclusions and Recommendation

The law has a statute of limitation for recovery of debts. A culture of borrowing is recommended and a culture of debt payment must be instilled in all for a of our human endeavor. For developmental purposes, the law should continue to monitor borrowing, through prudential guidelines and paybacks. Appropriate sanctions should also be ensured to prevent predatory lending practices and reckless in-house/external borrowing practices. Government and Banks need to continue publishing borrowers who fail to service their debts. In a situation where the creditor does not recover the full debt owed within six (6) years, the creditor can still be heard by a court of competent jurisdiction as there was a break in causation. Rule of law represents our character for civilized living. Lawyers are voices of the people. Well-trained and independent lawyers are needed more than before. Global threat of corruption undermines the independence of the judiciary over recovery of debts.

¹⁶SCC 288/2015

¹⁷[1992] 5NWLR (Pt 240) 228