



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 3737 of 1995

JAMES G. K. NJOROGE t/a BARAKA TOOLS & HARDWAREDECREE HOLDER

VERSUS

KENYA CEMENT MARKETING LIMITEDJUDGMENT DEBTOR

AND

- 1. KENYA COMMERCIAL BANK LTD**
- 2. BARCLAYS BANK OF KENYA LTD**
- 3. BAMBURI PORTLAND CEMENT CO LTD**
- 4. EAST AFRICAN PORTLAND CEMENT CO LTD**
- 5. CITIBANK NA**
- 6. STANDARD CHARTERED BANK OF KENYA LTD**

7. CO-OPERATIVE BANK OF KENYA LTD.....GARNISHEES

RULING

This matter has had a rather convoluted history. In 1997 the Plaintiff, JAMES G. K. NJOROGE, trading as BARAKA TOOLS & HARDWARE (hereinafter called the Decree-Holder) obtained interlocutory judgement against the Defendant, KENYA CEMENT MARKETING LTD (hereinafter called the Judgment-Debtor) for a sum of money. The Judgment-Debtor appealed against the said interlocutory judgment vide Court of Appeal Civil Appeal No 75 of 1997. It also applied herein for stay of further proceedings pending disposal of that appeal. On 27th February 1997 the court (Kuloba, J) granted conditional stay pending disposal of the appeal. One of the conditions was-

“(a) That the Defendant do within fourteen (14) days from the date hereof provide two (2) guarantors for the satisfaction of any judgment and costs that may be passed and ordered to be paid to the Plaintiff”.

The Judgment-Debtor provided the two guarantors. The first guarantor was BAMBURI PORTLAND CEMENT (hereinafter called the 3rd Garnishee) while the second one was EAST AFRICAN PORTLAND CEMENT LTD (4th Garnishee). Their guarantees were filed respectively on 7th and 8th

April 1997. By those guarantees the 3rd and 4th Garnishees undertook that in the event judgment is given against the Judgment-Debtor in this suit in favour of the Decree-Holder for the payment of any money:-

“and the said (Judgment-Debtor) is for any reason unable to satisfy the decree or award arising from the judgment, then, subject to all rights of appeal available to the said (Judgment-Debtor) and subject to any further orders of thecourt”,

they would:-

“fully pay and satisfy the said decree or award in place of the said (Judgment-Debtor)...”.

The Court of Appeal eventually allowed Civil Appeal No 75 of 1997. The interlocutory judgment was set aside and the case remitted back to this court for full hearing. The case was eventually heard, and on 16th June 2006 judgment was entered for the Decree-Holder for various sums of money. The Judgment-Debtor filed notice of appeal. It also sought from this court stay of execution pending appeal. On 11th July 2006 the court (Visram, J) granted an interim stay of execution pending disposal *inter partes* of the application for stay. The stay was for 90 days upon the condition that the Judgment-Debtor do deposit within ten (10) days an insurance bond to guarantee payment of the decretal sum. An insurance bond given by A P A INSURANCE LIMTIED on 20th July 2006 was deposited. It was for a sum of Kshs.43,208,518/36.

It would appear that the application for stay of execution was eventually dismissed. The Decree-Holder then sought to enforce the insurance bond given by A P A Insurance Limited by garnishee proceedings. The application was eventually dismissed.

In the meantime, the Judgment-Debtor, being aggrieved by the dismissal of its application for stay of execution, lodged notice of appeal. It also applied to the Court of Appeal for stay of proceedings and execution pending appeal. On 9th July 2007 that court conditionally granted stay. The condition was that the Judgment-Debtor provides within 21 days a banker's guarantee from either BARCLAYS BANK OF KENYA LTD (hereinafter called the 2nd Garnishee) or KENYA COMMERCIAL BANK LTD (1st Garnishee) or STANDARD CHARTERED BANK LTD (6th Garnishee). From the body of the ruling of the Court it is clear that the banker's guarantee so provided would be security for the due performance by the Judgment-Debtor of any decree or order that may ultimately bind it upon disposal of the appeal.

As it happened, two bankers' guarantees were provided, both filed on 30th July 2007. The first one was by the 2nd Garnishee and was dated 27th July 2007. The second one was by the 1st Garnishee and was dated 30th July 2007. The guarantee by the 2nd Garnishee was for an amount not exceeding KShs 21,604,259/00. It provided that it was to expire on 27th July 2008. It also provided that any claim upon it

“shall be made....in writing not later than 30 days from the date of dismissal ofAppeal No 283 of 2006...”.

The guarantee by the 1st Garnishee provided that it would remain in force up to 30th July 2008 and that any demand in respect thereof should reach the bank not later than that date,

“...after which date this guarantee shall become null and void...”

It is clear that these two guarantees were limited in scope and would not have provided the kind of security envisaged in the order of stay granted by the Court of Appeal. The Decree-Holder realized as much and through his advocates raised objection to them by correspondence addressed to the Judgment-Debtor's Advocates. But beyond that he did nothing to ensure that adequate guarantees were provided. He could have done so by going back to the Court of Appeal to seek lifting of the stay upon the ground

that no proper and adequate guarantees had been provided.

The Judgment Debtor's appeal, being Civil Appeal No. 283 of 2006, was eventually struck out on 30th July 2008. The Decree-Holder then instituted garnishee proceedings vide chamber summons dated 14th August 2008. On 15th August 2008 the court (Nambuye, J) granted an *order nisi*. As a consequence of the same, various accounts holding large sums of money have been "frozen".

All the Garnishees, as well as the Judgment-Debtor, have opposed the garnishee application. They have all filed grounds of opposition and/or replying affidavits. I have read all of them, just as I have read the supporting affidavit. When the application came up for hearing *inter partes* on 30th September 2008 the learned counsels for the parties agreed, for reasons of expediency, to file written submissions. They all eventually did so. I have carefully considered those submissions. I have also perused the many cases and other authorities cited.

Various issues have been raised for determination, including the following:

1. Whether there is a debt due from each of the Garnishees to the Judgment-Debtor capable of being attached?
2. Whether the guarantees given by the 1st, 2nd, 3rd and 4th Garnishees are debts capable of attachment by way of garnishee proceedings?
3. Whether the guarantees herein can be enforced by way of garnishee proceedings?
4. Whether, in any event, the guarantees in question were valid at the time the present garnishee application was made?
5. Whether the present execution of decree proceedings by way of the garnishee proceedings are premature and invalid for want of leave under section 94 of the Civil Procedure Act, Cap. 21 (the Act)?

1. Is there a debt due from each Garnishee to the Judgment- Debtor capable of being attached?

Order 22, rule 1 of the Civil Procedure Rules provides for attachment of debts (other than the salary or allowance coming within the provisions of Order 21, rule 43) due to a judgment-debtor from any person in satisfaction of the decree against the judgment-debtor. The judgment-creditor must establish that there is a sum of money held by the garnishee that is due to and recoverable by the judgment-debtor. That is what would constitute a debt for purposes of garnishee proceedings.

In the present case, except for bank account No 000017229710300 maintained by the Judgment-Debtor with the 1st Garnishee at its Moi Avenue branch, the Decree-Holder has not established on a balance of probabilities that there is a sum of money due to and recoverable by the Judgment-Debtor from the other Garnishees. In this connection see paragraph 12 of the Decree-Holder's affidavit sworn in support of the application. The other accounts mentioned belong either to the 3rd Garnishee (maintained with the 2nd Garnishee), or to the 4th Garnishee (maintained with the 1st, and 7th Garnishees).

The Decree-Holder has also put forward speculation that the Judgment-Debtor must have proffered securities to the 1st, 2nd, 3rd and 4th Garnishees for the various guarantees given by them. But there is no evidence of these securities. The various arrangements between the Judgment-Debtor and the 1st, 2nd, 3rd and 4th Garnishees in respect to the guarantees are not before the court. We do not know, as between the Judgment-Debtor and those Garnishees, what the terms for the guarantees were, and whether as a consequence thereof there are now any debts due to and recoverable by the Judgment-Debtor from those Garnishees.

It is apparent that by these present proceedings the Decree-Holder is, by and large, trying to enforce the

various guarantees in issue. It is not a straight-forward attachment of debts under Order 22 of the Rules except for the above-mentioned account maintained by the Judgment-Debtor with the 1st Garnishee. It has not been denied in the replying affidavit filed on behalf of the 1st Garnishee on 28th August, 2008 (sworn by one EVANS MOSE) that the Judgment-Debtor maintains the account with the 1st Garnishee.

As far as the 5th, 6th and 7th Garnishees are concerned, there is simply no evidence before the court that they owe any monies that are due and recoverable by the Judgment-Debtor. The supporting affidavits filed with the application contain no such evidence. The replying affidavits filed on behalf of the 5th, 6th and 7th Garnishees clearly refute the assertion that they owe the Judgment-Debtor any debts. The technical objection raised in respect to the 5th Garnishee's replying affidavit will not detract from the fundamental fact that there is no debt due and owing from the 5th Garnishee to the Judgment-Debtor.

2. Are the guarantees given by the 1st, 2nd, 3rd and 4th Garnishees debts capable of attachment by way of garnishee proceedings?

A guarantee is a contractual arrangement by which the guarantor undertakes to perform that which is the obligation of the person on whose behalf the guarantee is given. That contractual arrangement will contain terms and conditions understood and agreed to by the parties, otherwise the party to whom the guarantee is given is at liberty to reject it if it does not meet his requirements.

The guarantees in the present case did not create any debts due to and recoverable by the Judgment-Debtor from the various Garnishees and they cannot be enforced by way of garnishee proceedings.

3. Can the guarantees herein be enforced by way of garnishee proceedings?

Whether or not the guarantees in question are deemed to be in the nature of surety, their enforcement is certainly not by way of garnishee proceedings as they are not debts that can be attached. If they be guarantees, pure and simple, and not in the nature of surety, they will be enforced as such under the law of contract. On the other hand, if they were to be held to be in the nature of surety within the meaning of section 92 of the Act (and I do not consider it necessary to decide that issue here) they will be enforced as provided under that section, including the requirement for due notice, which appears not to have been given. Such enforcement would be in the nature of execution of the decree directly against the surety, not by way of garnishee proceedings.

4. Were the guarantees in question valid at the time the present garnishee application was made?

This issue will be best determined when there are before the court proper proceedings to enforce the guarantees. There are not now such proper proceedings. I therefore decline to determine the issue.

5. Are the present garnishee proceedings premature and invalid for want of leave under section 94 of the Act?

Under section 94 of the Act, a decree-holder in the High Court is not entitled to execute a decree passed in exercise of the court's original civil jurisdiction before ascertainment of costs of the suit by taxation, unless the court gives leave for such execution. Garnishee proceedings are in essence special proceedings in execution of decree; but they are execution of decree proceedings nevertheless. There cannot issue any garnishee proceedings unless there is a decree in place capable of being executed. Order 22 of the Rules complements rather than ousts Order 21 in matters of attachment of debts in execution of decree.

I have perused the court record herein, including the ruling of Kubo, J of 3rd September, 2008 upon a preliminary objection to the present application. I cannot find in that ruling, as urged for the Decree-Holder, any indication that the issue of section 94 of the Act was dealt with in that ruling. The Decree-Holder has not urged that he has taxed his costs or obtained leave of the court under section 94 of the Act to execute the decree before taxation of costs. The execution proceedings by way of the present garnishee

proceedings are clearly premature.

In the event, I will allow the garnishee application only in respect to Account No 000017229710300 maintained by the Judgment-Debtor with the 1st Garnishee, Kenya Commercial Bank Ltd. The *order nisi* is hereby made *absolute* in respect to that account. Otherwise the garnishee application by chamber summons dated 14th August, 2008 has no merit and is hereby dismissed with costs to all the Garnishees except the 1st Garnishee who shall pay the Decree-Holder's costs. The garnishee order *nisi* granted on 15th August, 2008 is hereby set aside except in respect to the indicated account. Those will be the orders of the court.

DATED AT NAIROBI THIS 15TH DAY OF JANUARY, 2009

H. P. G. WAWERU

J U D G E

DELIVERED THIS 16TH DAY OF JANUARY, 2009