



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Suit 3737 of 1995**

**JAMES G.K. NJOROGE            }**

**T/a BARAKA TOOLS & HARDWARE    }.....JUDGMENT-CREDITOR**

**VERSUS**

**KENYA CEMENT MARKETING LTD..... JUDGMENT-DEBTOR**

**AND**

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

**RULING**

By *ex-parte* chamber summons dated 14.08.08 stated to be brought under Order XXII rules 1 and 1A of the Civil Procedure Rules and sections 3A and 92 of the Civil Procedure Act, Cap.21, the plaintiff/decree-holder applied for the following orders:-

- 1. That the application be certified urgent.
- 2. That the 1<sup>st</sup> named Garnishee’s current saving fixed deposit and/or suspense accounts at Kencom House Branch or at its Head Office, Kencom House and at its Branch at Athi River or elsewhere in Nairobi be attached to answer part of the decree passed herein against the judgment-debtor limited to a sum of Kshs.21,064,259/18 guaranteed by the 1<sup>st</sup> Garnishee.
- 3. That further and/or alternatively all debts owing or accruing due from M/S Kenya Commercial Bank Ltd, the 1<sup>st</sup> named Garnishee to the judgment-debtor and/or to East African Portland Cement Co. Ltd the judgment-debtor’s guarantor on the current saving fixed deposit accounts of East African Portland Cement Co. Ltd the 4<sup>th</sup> Garnishee the guarantor of judgment-debtor on Account No.229710002 at Kenya Commercial Bank Ltd Moi Avenue Kencom House

Nairobi, and/or from the Standard Chartered Bank of Kenya Ltd, Kenyatta Avenue Branch Nairobi, and/or from the Co-operative Bank of Kenya Athi River Branch and/or from Account No.000017229710300 and any other account of the judgment-debtor in the hands of the 1<sup>st</sup> named Garnishee at Kencom House Branch or at its Head Office and/or at the Branch of the 1<sup>st</sup> named Garnishee at Kitengela and elsewhere in Nairobi and any deposits or savings accounts or fixed deposit accounts or other securities given for the 1<sup>st</sup> Garnishee's Guarantee No.G0KE 86017077228 C and other accounts of the judgment-debtor and/or of East African Portland Cement in the hands of the 1<sup>st</sup>, 6<sup>th</sup> and 7<sup>th</sup> Garnishees be attached to answer the decree passed herein on 16.06.06 against the judgment-debtor currently standing at a sum of Kshs.54,442,732/90 and interest thereon at 12% per annum.

4. That the 2<sup>nd</sup> Garnishee's current savings fixed deposit and/or suspense accounts at Barclays Bank Trade Service Centre and at the 2<sup>nd</sup> Garnishee's Nkurumah Road Branch Mombasa or at its Head Office or at any Branches in Nairobi be attached to answer the sum of Kshs.21,604,259/= part of the decree guaranteed by the 2<sup>nd</sup> Garnishee.
5. That further or alternatively all debts owing or accruing due from the 2<sup>nd</sup> Garnishee to the judgment-debtor or to Bamburi Portland Cement Co. on account of the Guarantee Ref. No.74 GTEE 15150 dated 27.07.07 given by the 2<sup>nd</sup> Garnishee for Kshs.21,604,259/= and/or on account of its Guarantee herein and all sums on Account No.03-077-5013249 Barclays Bank Branch at Barclays Plaza Building Nairobi, and on any account to the 3<sup>rd</sup> Garnishee at Citibank N A Upper Hill and any account at Barclays Bank Nkurumah Branch in Mombasa and any other current savings or deposit accounts of the 3<sup>rd</sup> Garnishee and judgment-debtor in the hands of the 2<sup>nd</sup> and 5<sup>th</sup> named Garnishees due to the judgment-debtor and/or to the 3<sup>rd</sup> named Garnishee at Barclays Plaza Bank Trade Service Centre Barclays Plaza Branch Nairobi or at its Head Office and at its Nkurumah Road Branch Mombasa or at any Branch of the 2<sup>nd</sup> named Garnishee and at Citibank N A Citibank House Upper Hill Nairobi and any deposit or saving accounts or other securities for the 2<sup>nd</sup> Garnishee's Guarantee No.74GTEE15150 be attached to answer the decree passed herein against the judgment-debtor the decretal sum whereof is currently Kshs.54,442,732/90 and accrues interest at 12% per annum.
6. That the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> named Garnishees do appear in Court on 26.08.08 to inform the court what sums are due from each of them to the judgment-debtor in respect of Guarantees by each one of them.
7. That the Honourable Court be pleased to make any orders deemed fitting for the ends of justice.
8. That costs occasioned by these garnishee proceedings be taxed and paid by the judgment-debtor to the decree-holder.

The grounds upon which the application is based are:-

That the Garnishees are presently conniving at defeating guarantees given by each of them to the honourable court and that attachment is necessary and should be effected expeditiously for sums due to the judgment-debtor in the hands of the Garnishees and that there is legitimate fear stemming from the outcome of the Appeal and responses of the Garnishees that the Garnishees intend to flout the respective guarantees, are conniving to treat with utter contempt orders of this Honourable Court and the Court of Appeal and on the grounds in the annexed affidavit of James G.K. Njoroge and on further grounds and arguments on further grounds and arguments at the hearing of this application.

The application is supported by the affidavit of the aforesaid James G.K. Njoroge sworn on 14.08.08.

On 29.08.08 counsel for the 3<sup>rd</sup> Garnishee filed notice of preliminary objection to the decree-holder's/applicant's application which he stated to be premised on undisputed facts. The preliminary objection was stated to be based on points of law as follows:-

1. (a) That the Decree-Holder, while in possession of the Guarantee given by the 3<sup>rd</sup> Garnishee, subsequently elected to demand from the Judgment-debtor new or replacement guarantees in respect of the same Judgment debt and the Judgment-debtor pursuant to the said demand provided a replacement guarantee initially by APA Insurance Limited;
- (b) That the Decree-holder subsequently filed garnishee proceedings in this Honourable Court to enforce the said replacement guarantee and elected not to join the 3<sup>rd</sup> Garnishee in the said garnishee proceedings;
- (c) That after the lapse of the said guarantee given by APA Insurance Limited or being dissatisfied with it, the Decree-holder again elected to demand new guarantees to replace the same and the Judgment-debtor in response thereto provided replacement guarantees by the 1<sup>st</sup>, 2<sup>nd</sup> and other Garnishees which the Decree-holder accepted.

(d) That by reason of the matters stated in (a), (b) and (c) above the Decree-holder discharged the said guarantee given by the 3<sup>rd</sup> Garnishee and is estopped from proceeding further with the present garnishee proceedings against the 3<sup>rd</sup> Garnishee which do not lie.

2. Further and/or in the alternative the Decree-holder obtained the *ex-parte* garnishee order which was in the nature of an injunctive relief restraining the 3<sup>rd</sup> Garnishee from using or accessing all sums attached in its Bank accounts without providing to the court a suitable undertaking as to damages for the loss and damage that the 3<sup>rd</sup> Garnishee would suffer and has indeed suffered if the said application was found to be frivolous at the *inter-partes* hearing of the application. In the premises the *ex-parte* order ought to be discharged forthwith.

For his part, counsel for the Decree-holder did file on 01.09.08 what he described as a preliminary objection to the 3<sup>rd</sup> Garnishee's preliminary objection.

At the hearing before me on 01.09.08 of the application: the Decree-holder/applicant was represented by learning counsel, Mr F. N. Wamalwa; the Judgment-debtor was represented by learned counsel, Mr F. Athuok; the 3<sup>rd</sup> Garnishee was represented by learned counsel, Mr D. Oyatsi; the 4<sup>th</sup> Garnishee was represented by learned counsel, Mr E. Masika; the 1<sup>st</sup> Garnishee was represented by learned counsel, Mr N. Ojiambo; the 6<sup>th</sup> Garnishee was represented by learned counsel, Mr S. Makori; the 2<sup>nd</sup> and 7<sup>th</sup> Garnishees were represented by learned counsel, Miss I. Nyambura while the 5<sup>th</sup> Garnishee was represented by learned counsel, Miss L.K. Chui.

In his oral submissions before this court, counsel for the 3<sup>rd</sup> Garnishee essentially reiterated the points contained in his written notice of preliminary objection aforesaid. The gravamen of the 3<sup>rd</sup> Garnishee's submissions was that the basic facts are undisputed and that the guarantee given by the 3<sup>rd</sup> Garnishee was discharged by the parties in 2007 when the present applicant elected not to enforce the guarantee by the 3<sup>rd</sup> Garnishee and elected to accept new guarantees from the 1<sup>st</sup> and 2<sup>nd</sup> Garnishees. Counsel for the 3<sup>rd</sup> Garnishee said that the *ex-parte* order obtained by the applicant has caused financial loss to the 3<sup>rd</sup> Garnishee and urged this court to uphold the preliminary objection.

Counsel for the Judgment-debtor associated himself with the submissions of counsel for the 3<sup>rd</sup> Garnishee. Judgment-debtor's counsel's position was that the applicant tried to enforce new guarantees in court; that the guarantees now sought to be enforced were spent and that that is why new guarantees were put in place. In this regard, Judgment-debtor's counsel referred this court to rulings by Osiemo, J of 23.03.07 and 03.05.07. Judgment-debtor's counsel referred to Order XXI rule 18 to make the basic point that notice was required to be issued against the persons against whom execution is now being sought for them to show cause since according to him more than one year has elapsed after the date of decree and that the requisite notice has not been issued. He referred to section 94 of the Civil Procedure Act and said that the applicant did not obtain leave to execute before taxation as provided in that section. He (Judgment-debtor's counsel) also said that the applicant has not exhausted remedies against the principal debtor. Judgment-debtor's counsel urged that the *ex-parte* orders obtained by the applicant be discharged.

Counsel for 4<sup>th</sup> Garnishee associated himself with the submissions of the 3<sup>rd</sup> Garnishee's counsel and Judgment-debtor's counsel. He said that the position of the 3<sup>rd</sup> and 4<sup>th</sup> Garnishees derives from the ruling of Kuloba, J (as he then was) delivered on 27.02.97. According to the 4<sup>th</sup> Garnishee's counsel, the judgment of 16.06.06 brought to an end the guarantees by the 3<sup>rd</sup> and 4<sup>th</sup> Garnishees now sought to be enforced by the present application and that that is why there was need for fresh guarantees. Counsel for 4<sup>th</sup> Garnishee termed the present application as baseless and urged this court to dismiss it as against the 4<sup>th</sup> Garnishee.

Counsel for 1<sup>st</sup> Garnishee said he was only concerned with ground 2 in the 3<sup>rd</sup> Garnishee's notice of preliminary objection. The 1<sup>st</sup> Garnishee's counsel urged that if an undertaking as to damages is required, it should have been provided in respect of the orders sought against the 1<sup>st</sup> Garnishee as well. Counsel for 1<sup>st</sup> Garnishee urged this court to dismiss the application.

Counsel for 6<sup>th</sup> Garnishee said that the preliminary objection by the 3<sup>rd</sup> Garnishee does not affect the position held by the 6<sup>th</sup> Garnishee.

Counsel for 2<sup>nd</sup> and 7<sup>th</sup> Garnishees associated herself with the submissions of counsel for Judgment-debtor and for 1<sup>st</sup> Garnishee. She urged that if this court finds that the applicant ought to have provided an undertaking as to damages, the same finding should apply to the 2<sup>nd</sup> and 7<sup>th</sup> Garnishees.

Counsel for 5<sup>th</sup> Garnishee also associated herself with the position taken by counsel for 6<sup>th</sup> Garnishee. She (5<sup>th</sup> Garnishee's counsel) said that the 3<sup>rd</sup> Garnishees preliminary objection does not affect the 5<sup>th</sup> Garnishee, who according to her, has no dealings with the Judgment-debtor. Counsel for 5<sup>th</sup> Garnishee said the 3<sup>rd</sup> Garnishee maintains an account with the 5<sup>th</sup> Garnishee and that that appears to be the only reason why the 5<sup>th</sup> Garnishee has been brought into these proceedings. It was the 5<sup>th</sup> Garnishee's counsel's case that the Decree-holder/applicant knew that the 5<sup>th</sup> Garnishee has no dealings with the Judgment-debtor and that applicant should pay the 5<sup>th</sup> Garnishee's costs.

For his part, counsel for the Decree-holder submitted that it is not correct as maintained by counsel for the 3<sup>rd</sup> Garnishee that there are undisputed facts. He pointed out that the matter has been litigated since 1995 to-date and that the facts pleaded in the plaint were denied. He added that the facts before this court as per the chamber summons dated 14.08.08 have been opposed/disputed through grounds of opposition or replying affidavits. It was the applicant's counsel's case that the facts on which the present application is based are hotly contested by the opposing parties and that the court has to investigate the facts and make findings thereon. Applicant's counsel submitted that the court cannot investigate the facts on the basis of the 3<sup>rd</sup> Garnishee's preliminary objection, which should be on pure points of law. He said the court cannot dismiss the application as urged as it has not heard evidence. He added that for purposes of the preliminary objection, the court is not required to look at any evidence, except if there is no contest on the facts. It was his case that there is contest on facts. He elaborated on this by pointing out that the questions whether or not the 3<sup>rd</sup> Garnishee was discharged by agreement of the parties is an issue of evidence. He referred in this regard to Nuridin Bandali -vs- Lombank Tanganyika Ltd [1963] E.A 304 CA and said he is not aware of any agreement to discharge the 3<sup>rd</sup> and 4<sup>th</sup> Garnishees. He added that in dealing with a preliminary objection, the court cannot scamper beyond the papers in the application before it. The bottom-line of Decree-holder's/applicant's counsel's submission was that the 3<sup>rd</sup> Garnishee's preliminary objection be dismissed.

I have given due consideration to the 3<sup>rd</sup> Garnishee's preliminary objection

Law, J.A. said in Mukisa Biscuit Manufacturing Co. Ltd -vs - West End Distributors Ltd [1969] EA 696 (at 700) that:

'... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration.'

I associate myself with the learned Appeal Judge's characterization of a preliminary objection.

In the same case (at 701) Sir Charles Newbold, President of the then Court of Appeal for Eastern African described or defined a preliminary objection in the following terms:

'A preliminary objection is in the nature of what used to be a de demurrer. It raises a pure point of law which is urged on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.'

He added, instructively, rely that the improper raising of points by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion confuse issues. He cautioned that the practice should stop.

It is clear from the application before this court that there are disputed facts in this case. The court trying the application will have to investigate the relevant facts and make findings thereon in determining the application. This is not a proper case amenable for disposal by way of a preliminary objection. I associate myself fully with the description by Newsbold, President, of a preliminary objection. In my view the preliminary objection by the 3<sup>rd</sup> Garnishee in the present case is ill-conceived. It is unsustainable and the same is dismissed.

The chamber summons application dated 14.08.08 is now fixed for substantive hearing on 05.09.2008.

Orders accordingly.

Delivered at Nairobi this 3<sup>rd</sup> day of September, 2008

**B.P. KUBO**

**JUDGE**