



**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 & HARDWARE...PLAINTIFF**

**VERSUS**

**KENYA CEMENT MARKETING LTD.....DEFENDANT**

**AND**

**A.P.A. INSURANCE LIMITED.....THE INTENDED GARNISHEE**

**RULING**

The Plaintiff brought this application by way of Chamber Summons dated 4<sup>th</sup> August 2006 under Order XXII Rule 1 and 2. Order L Rule 1, 2 and 3 of the Civil procedure Rules and Sections 3A, 92 and 94 of the Civil Procedure Act seeking orders:

1. That the sum of Kshs.43,208,518.36 accruing due from the Garnishee to the Judgment debtor to the full extent of its Bond herein and all sums therein guaranteed payable to the Plaintiff to the credit of the Judgment debtor on account of the Bond dated 20<sup>th</sup> July 2006 issued by the Garnishee herein on 20<sup>th</sup> July 2006 by Policy NO.P/10/2006/1201/87 and guaranteed by the Garnishee/Guarantor be attached to answer the decree passed herein on 16<sup>th</sup> June 2006 against the Judgment – debtor to the extent of the sum of Kshs.43,208,518.36 only in partial satisfaction of sums ordered payable on the decree herein by the Defendant to the Plaintiff without interest thereon at 12% per annum from 16<sup>th</sup> June 2006 and that the interest on the said sum at the rate of 12% per annum from 16<sup>th</sup> June 2006 be payable by the Defendant.

The application is based on the grounds that attachment before taxation of costs is necessary and should be effected expeditiously if sums due to the judgment-debtor in the hands of the Garnishee will not be withdrawn and put beyond the scope of execution process the Garnishee's Bond herein being enforceable upon determination of the judgment-debtor's application herein dated 10<sup>th</sup> July 2006 dismissed on 3<sup>rd</sup> August July, 2006.

The application is also supported by an affidavit sworn by James G.K. Njoroge on 4<sup>th</sup> August 2006 in which he avers that by POLICY NO.P/10/2006/1201/87 issued by the Garnishee to the Defendant, the Garnishee bound itself to pay the sum of kshs.43,205,518.36 only to the Plaintiff on account of the judgment-debtor being the decretal sum upon hearing and determination of the judgment-debtor's application herein dated 10<sup>th</sup> July 2006, that on 3<sup>rd</sup> August 2006 the court dismissed the Defendant's application with costs to the Plaintiff; that the whole of the decretal sum remains wholly unpaid; that the

Defendant ceased trading on or about 26<sup>th</sup> November 1993 and that there is fear that unless the court makes orders expeditiously granting leave to execute decree before taxation and therein issue an order to attach the sum Shs.43,208,518.36 guaranteed by the Garnishee, the Defendant – judgment debtor will in all probability withdraw and cancel the said Bond and put it beyond the reach of execution.

The application is opposed by the Intended Garnishee on the ground that the Insurance Bond issued by the Intended Garnishee Company and deposited in court specifically stated therein that; “This bond to remain in force until full hearing and determination of the Defendant’s Application dated 10<sup>th</sup> July 2006;” that the said application was heard and finally determined on 3<sup>rd</sup> August 2006 and that the Garnishee Insurance Bond which is the subject of the Plaintiff’s Application expired on 13<sup>th</sup> September 2006 when the Bond was cancelled.

The issues in this application can be best approached by a recital of the proceedings of the matter up to date.

On 16<sup>th</sup> June 2006 the court entered judgment in favour of the Plaintiff and a decree therefrom subsequently issued against the Defendant in the sum of Kshs.43,208,518.36. Being aggrieved by the said judgment and decree the Defendant made an application by way of Notice of Motion on 10<sup>th</sup> July 2006 seeking orders of Stay of Execution of the said decree pending an Intended Appeal. Upon hearing of the said application at the first instance on 11<sup>th</sup> July 2006, the court (Hon Mr. Justice A Visram) granted an order of “

“Temporary Stay of Execution for 90 days on condition that the Applicant/Defendant shall deposit an Insurance Bond to guarantee payment of the Decretal sum within 10 days failing which the orders shall lapse”

The Defendant approached the Intended Garnishee Company to issue it with such an Insurance Bond for depositing in court as ordered. The Intended Garnishee Company issued such an Insurance Bond which was dated 20<sup>th</sup> July 2006 and deposited in court on 20<sup>th</sup> July 2006. The said Insurance Bond so issued specifically stated thus:

“This bond to remain in force until full hearing and determination of the Defendant’s Application dated 10<sup>th</sup> July 2006.”

On 14<sup>th</sup> July 2006 the Plaintiff moved the court with an application to vary/review the said order of 11<sup>th</sup> July 2006 in so far as it related to the guaranteeing of the Temporary Stay for 90 days.

On the 24<sup>th</sup> July 2006 both the Plaintiff’s and the Defendant’s respective Advocates on record appeared before the court (Hon. Mr. Justice Visram) and varied the said orders of 11<sup>th</sup> July 2006 by consent such that, the orders of 11<sup>th</sup> July 2006 were varied to the effect that the Temporary Stay of Execution be pending the inter partes hearing and determination of the Defendant’s Application to read – “Stay of Execution pending appeal and not 90 days as earlier ordered”.

The said variation of 24<sup>th</sup> July 2006 was done without the consent and/or knowledge of the Intended Garnishee Company and after the Insurance Bond had duly issued and deposited in court. The said Defendant’s Application dated 10<sup>th</sup> July 2006 was heard and determined by Ang’awa J who delivered her ruling on 3<sup>rd</sup> August 2006 dismissing the application. The Intended Garnishee on 13<sup>th</sup> September 2006 cancelled the said Insurance Bond deposited in court on 20<sup>th</sup> July 2006. The Deed of Cancellation of the Insurance Bond stated in part:-

“The said Insurance Bond was issued and expressly stated therein to remain in force until full hearing and determination of the application dated 10<sup>th</sup> July 2006.”

The said application dated 10<sup>th</sup> July 2006 was determined on 3<sup>rd</sup> August 2006 effectively discharging the said Insurance Bond.

Now we APA Insurance Limited do hereby confirm the lapse of the said Insurance Bond by this Deed of Cancellation and Revoke any temporary rights that may have accrued therefrom in favour of the Plaintiff Mr. James G.K. Njoroge T/A BARAKA TOOL AND HARDWARE by virtue of the said Court Order given on 11<sup>th</sup> July 2006 for TEMPORARY STAY OF EXECUTION.

Dated at Nairobi this 13<sup>th</sup> September 2006.

It is submitted on behalf of the Plaintiff that the Insurance Bond deposited by the Intended Garnishee contains an unequivocal acknowledgement of indebtedness of the Garnishee to the Judgment Creditor to whom the Judgment is liable on the principal judgment debt. It is given under seal and is enforceable directly against the Garnishee.

But counsel for the Garnishee submitted that the Garnishee issued the Insurance Bond which specifically stated that the bond was to remain in force until full hearing and determination of the Defendant's Application dated 10<sup>th</sup> July 2006.

The Insurance Bond was therefore as temporary as the order to which it was a condition, that is, only to be in force upto the full hearing and determination of the application dated 10<sup>th</sup> July 2006. The Insurance Bond was only Intended to remain in force for the purpose of the application dated 10<sup>th</sup> July 2006.

It is further submitted that the Garnishee having not been party to the consent order recorded by counsel for the Plaintiff and the Defendant on 24<sup>th</sup> July 2006 that varied the earlier order of 11<sup>th</sup> July 2006, it cannot be bound by it.

Moreover the amendments effected by the order of 24<sup>th</sup> July 2006 were never reflected on the Insurance Bond deposited in court by the Garnishee on 20<sup>th</sup> July 2006. This follows therefore that the cancellation of the Bond on 13<sup>th</sup> September 2006 based on the hearing and determination of the Defendant's Application dated 10<sup>th</sup> July 2006 whose ruling was delivered on 3<sup>rd</sup> August 2006 was proper and the bond was discharged.

In the result the Plaintiff's Chamber Summons dated 4<sup>th</sup> August 2006 is dismissed with costs.

Dated and delivered at Nairobi this 3<sup>rd</sup> day of May, 2007.

**J.L.A. OSIEMO**

**JUDGE**