



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: HANNAH OKWENGU, G. B. KARIUKI, & J. MOHAMMED, J.J.A.)

CIVIL APPEAL NO. 218 OF 2010

BETWEEN

JAMES G. K. NJOROGE

T/a BARAKA TOOLS & HARDWARE (a firm).....APPELLANT

AND

KENYA CEMENT MARKETING CO LTD.1ST RESPONDENT

BAMBURI PORTLAND CEMENT CO. LTD. ...2ND RESPONDENT

EAST AFRICAN PORTLAND CO. LTD.....3RD RESPONDENT

(Appeal from ruling and order of the High Court of Kenya

at Nairobi (Rawal, J.) dated 11th June, 2010

in

HC. CIVIL SUIT NO. 3737 OF 1995)

AT NAIROBI

JUDGMENT OF J. MOHAMMED, JA.

Background

[1] This appeal has a long and chequered background. The appeal originated from **High Court Civil Suit No. 3737 of 1995** that was filed by **James G. K. Njoroge t/a Baraka Tools and Hardware Limited (the appellant)**. By an amended Plaintiff dated 20th December, 2005 the appellant sued **Kenya Cement Marketing Limited (the 1st respondent)** seeking damages for breach of contract and loss arising out of under delivery and erroneous invoicing.

[2] The 1st respondent despite being served with the plaintiff and the summons, failed to enter appearance and on 15th March, 1996 an interlocutory judgment in default of defence was entered against it. The 1st respondent applied to the High Court to set aside the interlocutory judgment. The application was dismissed by the High Court, (**Bosire J**, as he then was) in a ruling dated 23rd May, 1996.

[3] Dissatisfied with that ruling, the 1st respondent appealed against that decision to this Court in **Civil Appeal No. 75 of 1997**. Despite the appeal, the appellant herein sought to enforce the *ex parte* judgment and set down the case for formal proof to assess the damages in consequence of the interlocutory judgment.

[4] The case came up for formal proof before **Kuloba, J**, in the High Court. The 1st respondent filed an application in the High Court to stay the formal proof or further proceedings. By a ruling delivered on 27th February, 1997, **Kuloba, J**, granted a stay of proceedings on condition

that the 1st respondent provides within fourteen (14) days two (2) guarantors for the satisfaction of any judgment inclusive of costs that may be passed and ordered to be paid to the appellant. The learned Judge also ordered the 1st respondent to take active steps to expedite the hearing of Civil Appeal No. 75 of 1997 pending the appeal and not dispose of or remove from jurisdiction any of its property during the pendency of the appeal unless leave of the court was obtained. The 1st respondent was ordered to pay the costs of the application in any event.

[5] In compliance with the order of the High Court, (**Kuloba, J.**) the High Court, **Bamburi Portland Cement Co. Ltd**, (the 2nd respondent) and **East African Portland Cement Company Limited**, (the 3rd respondent) provided guarantees dated 17th April, 1997 and 4th April, 1997 respectively and the High Court proceedings were stayed pending the hearing and determination of **Civil Appeal No. 75 of 1997**.

The guarantees were in the following form:-

Civil Suit No. 3737 of 1995

Guarantee

“In terms of the Order of the High Court given on 27th February, 1997 We **EAST AFRICAN PORTLAND CEMENT LIMITED**, do hereby guarantee and undertake that in the event Judgment is given against the Defendant herein **KENYA CEMENT MARKETING LIMITED** in this suit in favour of the Plaintiff for the payment of any money and the said Defendant is for any reasons unable to satisfy the Decree or award arising from the Judgment, then subject to all rights of Appeal available to the said Defendant, (**the 1st respondent herein**) and subject to any further orders of the Honourable Court, we shall fully pay and satisfy the said Decree or award in place of the said Defendant, **KENYA CEMENT MARKETING LIMITED**.

Civil Suit No. 3737 of 1995

Guarantee

In terms of the Order of the High Court given on 27th February, 1997 We, **BAMBURI CEMENT LIMITED**, do hereby guarantee and undertake that in the event Judgment is given against the Defendant herein **respondent herein**) **KENYA CEMENT MARKETING LIMITED** in this suit in favour of the Plaintiff for the payment of any money and the said Defendant is for any reasons unable to satisfy the Decree or award arising from the Judgment, then subject to all rights of Appeal available to the said Defendant and subject to any further orders of the Honourable Court, we shall fully pay and satisfy the said Decree or award in place of the said Defendant, **KENYA CEMENT MARKETING LIMITED**.”

[6] **Civil appeal No. 75 of 1997** was heard and in a judgment delivered on 15th October, 1997, this Court (**Tunoi, Shah & Pall, JJ.A**) set aside the *ex parte* judgment entered in favour of the appellant on 15th March, 1996 and the 1st respondent was granted leave to file a defence in the suit within fifteen (15) days from the date of the judgment.

[7] This Court further ordered that the conditions imposed by the High Court for stay of proceedings by **Kuloba, J** be extended until the hearing and determination of the suit in the High Court. In compliance with the said order, the 1st respondent filed a defence denying the appellant’s claim. The case proceeded to trial and on 16th June, 2006, judgment was entered against the 1st respondent and in favour of the appellant. A decree was drawn for Kshs.43,208,518/36.

[8] Aggrieved by the judgment and decree, the 1st respondent appealed to this Court and lodged **Civil Appeal No. 283 of 2006**. This appeal was struck out as incompetent on 30th July, 2008. The 1st respondent also filed **Civil Appeal No. 276 of 2009** which was dismissed on 21st September, 2015.

[9] By a Notice of Motion filed on 10th July, 2006, the 1st respondent applied to the High Court for a stay of execution of the order and judgment of the High Court dated 16th June, 2006 in Civil Suit No. 3737 of 1995 pending the filing, hearing and determination of the intended appeal. The High Court (**Visram, J.** as he then was) granted a conditional order for stay that the 1st respondent deposits in court an Insurance Bond within ten (10) days to guarantee payment of the decretal sum failing which the order of stay was to lapse. The stay order was initially to last for 90 days.

[10] The 1st respondent complied with the said condition and secured an Insurance Bond from **APA Insurance Limited** (the Insurance Bond) on 20th July, 2006 for the sum of Kshs.43,208, 518/36. The Insurance Bond was in the following terms:

“INSURANCE BOND FOR COSTS – CASE NO. 3737 OF 1995

BY THIS BOND WE APA INSURANCE LIMITED of Post Office Box Number 30065-00100 NAIROBI for and on behalf of KENYA CEMENT MARKETING LIMITED, P. O. BOX 14267 – 00800, NAIROBI bind ourselves to MR.

JAMES G. K. NJOROGI T/A BARAKA TOOLS & HARDWARE the sum of Kshs.43, 208, 518.36 9KENYA SHILLINGS FORTY THREE MILLION TWO HUNDRED AND EIGHT THOUSAND FIVE HUNDRED AND EIGHTEEN AND

CENTS THIRTY SIX ONLY) being the Plaintiffs Decretal sum in High Court Civil Suit No. 3737 of 1995 or such lesser amount as shall be ordered by the High Court. This bond to remain in force until full hearing and determination of the Defendant's application dated 10th July, 2006 in HIGH COURT CIVIL SUIT NO. 3737 OF 1995.

WHEREAS Kenya Cement Marketing Limited is the Defendant in High Court Civil Suit No. 3737 of 1995 at the High Court Nairobi in which Mr James G. K. Njoroge is the Plaintiff.

WHEREAS by an order by Honourable Mr. Justice Visram made on the 11th day of July, 2006 in the said High Court Civil Suit No. 3737 of 1995 of 1995 it was ordered that the Plaintiff do provide security for the Decretal sum by way of an Insurance Bond in favour of the Plaintiff, JAMES G. K. NJOROGE T/A BARAKA TOOLS & HARDWARE. The said Bond to remain in force until full hearing and determination of the Defendant's Application dated 10th July, 2006 in HIGH COURT CIVIL SUIT NO. 3737 OF 1995. This bond is hereby issued by APA Insurance Limited pursuant to the said Court Order.

SEALED by the Common Seal of

APA INSURANCE LIMITED

At Nairobi this 20th day of July, 2006

APA Insurance Ltd.

DIRECTOR

DIRECTOR/SECRETARY”

[11] Upon the dismissal of the order of stay of execution, the appellant elected to enforce the said Insurance Bond by instituting garnishee proceedings in execution of the decree. On 4th August, 2006, the appellant filed an application seeking leave of the court to execute the decree. The application was opposed by APA Insurance Limited and by a ruling dated 3rd May, 2007, **Osiemo, J.** dismissed the application with costs.

[12] Dissatisfied by the dismissal of its application, the appellant filed **Civil Appeal No. 118 of 2007** to this Court seeking to reverse the High Court order and compel **APA Insurance Company Limited** to honour the said guarantee in execution of the decree. The 1st respondent applied to this Court for stay of proceedings and execution pending appeal. On 9th July, 2007 this Court (**O’Kubasu, Waki & Onyango Otieno, JJ.A**) granted stay in the following terms:-

“As there is largely an agreement between the parties, we grant the application on condition that the applicant (*the 1st respondent herein*) provides a Banker's guarantee from any of the following three banks operating in the Country: Barclays Bank of Kenya Ltd, Kenya Commercial Bank Ltd or Standard Chartered Bank Ltd. The guarantee shall be provided within 21 days of this ruling, and in default, this application shall stand dismissed with costs.”

[13] Two Bank guarantees were filed on 30th July, 2007. One was a guarantee from Barclays Bank of Kenya Limited dated 27th July, 2007 and the second one was from Kenya Commercial Bank Limited dated 30th July, 2007.

The Bank guarantee from Barclays Bank of Kenya Limited was in the following terms:

“WHEREAS KENYA CEMENT MARKETING LIMITED (HEREINAFTER CALLED “THE APPLICANT) HAS

UNDERTAKEN, IN PURSUANCE OF CIVIL APPLICATION NO. NAIROBI 243 OF 2006 BETWEEN KENYA CEMENT MARKETING LTD VS JAMES G.K. NJORONGE T/A BARAKA TOLS & HARDWARE (HEREINAFTER CALLED “THE RULING”). TO GIVE SECURITY AND WHEREAS IT IS REQUIRED THAT A BANK GUARANTEE BY A RECOGNIZED BANK FOR THE DECETAL SUM RAISED OF KES21, 604, 259.00

(TWENTY ONE MILLION SIX HUNDRED FOUR THOUSAND TWO HUNDRED FIFTY NINE KENYA SHILLIGS ONLY) AGAINST KENYA CEMENT MARKETING LTD BE DEPOSITED INTO COURT PENDING DETERMINATION OF THE APPEAL BY THE APPLICANT AGAINST THE RULING.

WE, BARCLAYS BANK OF KENYA, OF P.O. BOX 46661, NAIROBI HEREBY AFFIRM THAT WE ARE GUARANTORS AND RESPONSIBLE TO YOU ON BEHALF OF THE APPLICANT UPTO A TOTAL OF KES21, 604, 259.00 (TWENTY ONE MILLION SIX HUNDRED FOUR THOUSAND TWO HUNDRED FIFTY NINE KENYA SHILLINGS ONLY) AND WE UNDERTAKE TO PAY YOU UPON RECEIPT OF YOUR FIRST WRITTEN DEMAND DECLARING THAT THE APPEAL HAS BEEN DISMISSED PROVIDE THAT THE AMOUNT CLAIMED DOES NOT EXCEED THE AFOREMENTIONED AMOUNT.

OUR AGGREGATE LIABILITY WILL NOT EXCEED KES21, 604, 259.00.

ANY CLAIM HEREUNDER SHALL BE MADE BY YOU TO US IN WRITING NOT LATER THAN 30 DAYS FROM THE DATE OF THE DISMISSAL OF THE APPEAL NO. 283 OF 2006. SUCH A CLAIM MUST BE DELIVERED TO OUR COUNTERS AT BARCLAYS BANK OF KENYA, BARCLAYS PLAZA, LOITA STREET, MEZZANINE I BY THE SAID DATE.

THIS GUARANTEE IS ISSUED SUBJECT TO THE LAWS OF KENYA AND EXPIRES ON 27/07/08 WHEREUPON THE BANK'S LIABILITY SHALL BE NULL AND VOID. ANY CLAIM SHOULD BE RECEIVED BY US BY THAT DATE."

The Bank guarantee from Kenya Commercial Bank Limited was in the following terms: -

"BANK GUARANTEE NO. GOKE86017077228C FOR KSHS.21,604,259=18 BY ORDER OF KENYA CEMENT MARKETING LIMITED IN RESPECT TO A COURT CASE OF NAIROBI CIVIL APPLICATION NO. 243 OF 2006 – KENYA CEMENT MARKETING LIMITED VS JAMES G.K. NJOROGE T/A BARAKA TOOLS & HARDWARE

We, Kenya Commercial Bank Limited, Trade Finance Centre, P.O. Box 48400, Nairobi, Kenya, hereby Guarantee and undertake to pay to Deputy Registrar, Court of Appeal a sum not exceeding Kshs.21, 604, 259=18 (say Kenya Shillings Twenty One Million Six Hundred Four Thousand Two Hundred Fifty Nine Cents Eighteen only) as surety for Kenya Cement Marketing Limited of P.O. Box 14267 – 00800, Nairobi, Kenya in respect to the Case of Nairobi Civil Application No. 243 of 2006 – Kenya Cement Marketing Limited vs James G.K. Njoroge T/A Baraka Tools and Hardware.

Our liability under this guarantee is limited to an aggregate amount of Kshs.21, 604,259=18 (say Kenya Shillings Twenty One Million Six Hundred Four Thousand Two Hundred Fifty Nine Cents Eighteen only).

The Guarantee will remain in force up to 30th July, 2008 and any demand in respect thereof should reach the Bank not later than the above date after which date this Guarantee shall become null and void whether the original guarantee is returned to us or not.

This guarantee is subject to the Uniform Rules for Demand Guarantees. ICC Publication No. 458.

On expiry please return this Guarantee to us.

Signed in Nairobi this 30th day of July, 2007."

[14] When **Civil Appeal No. 283 of 2006** was struck out, the appellant instituted garnishee proceedings against the 2nd and 3rd respondents and **Barclays Bank of Kenya Limited** and **Kenya Commercial Bank Limited** as guarantors vide Chamber Summons dated 14th August, 2008.

[15] On 29th July, 2009, the appellant filed an application for execution of the guarantees that had been issued by the 2nd and 3rd respondents. The appellant contemporaneously applied for a Notice to Show Cause against the 2nd and 3rd respondents. The Deputy Registrar issued a Notice to Show Cause against the 2nd and 3rd respondents and consequently warrants of attachment were issued against the 2nd and 3rd respondents. The application for execution by the appellant and the issuance of the warrants of attachment culminated in the 2nd and 3rd respondents filing applications dated 15th October, 2009 and 16th December, 2009 respectively disputing the said application for execution. The applications were heard and determined by **Rawal, J** (as she then was) whose ruling is the subject of this appeal. In the ruling delivered on 11th June, 2010. The learned Judge held in part:-

"1. That the two guarantees lapsed and or were discharged by conduct of the decree-holder and as they intended to create a legal relation it falls within the realm of equitable estoppel and I do find so.

[11] In the premises I do order that the application filed on 28th July, 2009 for execution against the two guarantors namely Bamburi Cement Co. Ltd and East Africa Portland Cement Co. Ltd and all consequential and resultant proceedings and orders made therein be and are hereby set aside with costs to the two said guarantors/applicants."

Aggrieved by that decision, the appellant filed the instant appeal.

[16] The appellant's Memorandum of appeal *inter alia* raises grounds of appeal as follows; that the learned Judge misdirected herself in finding that the guarantees given pursuant to orders of the High Court as a condition for stay of execution of decree had been altered by the 1st Respondent and/or by the

Appellant; in granting final orders for provision of guarantees without any valid application; in exercising jurisdiction to discharge guarantees given by the 2nd and 3rd Respondents for the debts of the 1st Respondent without first hearing the 1st Respondent; in failing to give due consideration to facts, circumstances and events both prior and subsequent to the orders for provision and continuation of guarantees by the High Court and by the Court of Appeal premised on the moribund state of the 1st Respondent; in making orders beyond the scope of prayers on the 1st and 2nd Respondents' applications and beyond her jurisdiction; and in making orders discharging the guarantees by the 2nd and 3rd Respondents as mere conditions appurtenant to undisturbed lawful and final Orders of the High Court and of the Court of Appeal without notice to the 1st Respondent and without an application to set aside, vary, stay or review such orders. The appellant seeks the following orders:-

“(a) That the ruling of the High Court allowing the 2nd Respondent’s Notice of Motion dated 15th September, 2009 and the 3rd Respondent’s Notice of Motion dated 16th December, 2009 be set aside and that the said Notices of Motion be dismissed.

(b) That in default of satisfaction thereof by the 3rd Respondent the decree of the High Court be executed against the 1st and 2nd respondents.

(c) That the Appellant do have costs of the 2nd Respondent’s Notice of Motion dated 15th September, 2009 and Chamber Summons dated 15th December, 2009 and of the 3rd Respondent’s Notice of Motion dated 16th December, 2009 in the High Court and costs of this Appeal.”

Submissions by Counsel

[17] The parties argued their respective cases through written submissions that were highlighted in court before us. At the hearing, **Mr Wamalwa** represented the appellant, **Mr Oyatsi** represented the 1st and 2nd respondents while **Mr B. M. Simiyu** represented the 3rd respondent.

The Appellant’s Submissions

[18] The appellant submitted that the High Court erred in exercising inherent jurisdiction in an execution matter that had been dealt with by the Deputy Registrar. On the guarantees by the 2nd and 3rd respondents, the appellant contended that they were conditional upon the 1st respondent exhausting all its rights of appeal and upon the 1st respondent defaulting in payment. The appellant argued that its action for recovery against the other securities given upon the orders for stay was within the intendment and contemplation of the terms of the guarantees; that the 1st respondent’s applications for stay were incidental to its right of appeal and that the appellant could not per force of court order be deemed to have elected out of or substituted or waived his rights; and that there was no evidence that it had been given by the 1st respondent any replacement securities.

The Respondents’ Submissions

The 1st respondent did not file any documents or make any submissions.

[19] The 2nd respondent submitted that the two guarantees issued by itself and the 3rd respondent were due and payable on 16th June, 2006 when the suit was determined by the High Court; that instead of the appellant enforcing the guarantees against it and the 3rd respondent, he took action which was contra the enforcement of the guarantees and agreed with the 1st respondent to stay or extend the execution of the decree or enforcement of the judgment in exchange for new securities; that upon dismissal of the application for stay, the appellant did not call upon the 2nd and 3rd respondents to honor the guarantees but instead chose to pursue the provider of the insurance bond; that the appellant accepted another security in the form of Bank guarantees from **Kenya Commercial Bank Ltd** and **Barclays Bank of Kenya Ltd** to secure the decretal amount pending the determination of the appeal; that the appellant upon dismissal of the appeal by this court pursued payment from the said banks; that this conduct and election by the appellant led it to believe that the appellant had elected to abandon and waive its right to pursue or enforce the guarantee it had issued; that it would have been prejudicial for it to honour the guarantee three years after the judgment was passed, as the judgment debt had substantially changed and increased from what it was when the judgment was delivered on account of increased interest; that this prejudice was caused by the appellant’s election not to enforce the guarantee on its due date.

[20] The 3rd respondent submitted that the entire process of execution undertaken by the appellant was unlawful; that contrary to Section 92 of the Civil Procedure Act under which the execution process was premised, the appellant gave the respondents (as surety) two days’ notice of the hearing which was not sufficient time for the respondents to appropriately respond to the claim and to be heard; that the Deputy Registrar of the High Court in handling the execution proceedings should have treated it as a suit and should have therefore considered the responses filed by the respondents; that the Deputy Registrar did not consider the Notice of Preliminary Objection dated 26th October, 2009 filed by the 3rd respondent on the ground *inter alia* that the guarantees issued by the 3rd respondent on 8th April, 1997 was spent and the Replying Affidavit filed by the 3rd respondent’s Legal Officer, **Ms Sheila Kahuki**; that had the Deputy Registrar considered the Preliminary Objection and the said Replying Affidavit, he would not have issued the warrants of attachment summarily.

[21] The 3rd respondent further submitted that the guarantee it issued was subject of two conditions, the 1st respondent’s right of appeal and further orders of the court; that at the time the appellant sought to enforce the guarantee, the conditions were subsisting as the 1st respondent had filed an appeal and had also sought orders of stay execution; that the guarantee was therefore incapable of enforcement; that by the appellant seeking and obtaining other securities by way of an Insurance Bond and Bank Guarantees, the appellant’s election of new securities had the effect of nullifying the securities issued by the 2nd and 3rd respondents. The 3rd respondent relied on the case of **Scarff v Jardine [1881-1885] ALL ER 658**, and argued that by dint of the doctrine of election, the appellant was precluded from exercising its right of execution against it; that by the appellant seeking further securities and seeking to enforce them, it was estopped from enforcing the guarantee issued.

Determination

[22] I have carefully considered the record, the respective submissions by learned counsel, and the authorities cited and the law.

[23] The issue for determination is whether the appellant is entitled to enforce the guarantees issued by the 2nd and 3rd Respondents dated 4th April and 17th April, 1997 to satisfy the judgment debt after he had subsequently secured other guarantees.

[24] It is the 2nd and 3rd respondents' contention that by the appellant accepting and seeking to enforce other securities, viz the Insurance Bond and Bank Guarantees, the respondents' guarantees to the appellant had thereby been nullified by the conduct of the appellant. The appellant on his part argued that their attempt to enforce the Insurance Bond and Bank Guarantees was within the intendment and contemplation of the guarantees issued by the 2nd and 3rd respondents.

[25] It is the 2nd and 3rd respondents' further contention that even after the appeal in respect of which guarantees had been secured was dismissed the appellant pursued the Insurance Bond and Bank Guarantees which led the 2nd and 3rd respondents to believe that the appellant had waived its right to enforce the guarantees they had issued and was therefore estopped by the doctrine of election.

[26] Subsequently, the High Court dismissed the application for stay and the 1st respondent appealed to this Court. This Court granted stay of execution on condition that Bank guarantees were provided. In compliance with the court order, the 1st respondent obtained Bank guarantees from Barclays Bank of Kenya Limited and Kenya Commercial Bank limited.

[27] **The Law of Guarantees** by **Geraldine Andrews & Richard Millet** 2nd Edition, at page 156 states as follows:-

“A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contract to indemnify the Creditor upon the happening of a contingency namely the default of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependant upon the default of the principal and which does not arise until that point.”

The obligation of the Guarantor/Surety is therefore secondary and will only arise when the Principal Debtor fails to perform his obligations. In the instant case the guarantees issued by the 2nd and 3rd respondents were dependant upon the 1st respondent being unable to satisfy the decree or award from the judgment.

[28] Further, the guarantees were subject to the 1st respondent's right (as Judgment Debtor) to appeal, and to further orders of the court. At the time of seeking to enforce the 2nd and 3rd respondents' guarantees, both conditions were subsisting and the guarantees were therefore incapable of enforcement.

The 1st respondent had filed an appeal against the subject judgment which was pending hearing and determination. The 1st respondent had also sought for orders of stay of execution in the High Court and in this Court. The High Court granted the 1st respondent orders of stay of execution on condition that the judgment was secured. The 1st respondent procured the Insurance Bond in compliance with the court's order. Subsequently, the High Court dismissed the application for stay and the 1st respondent appealed to this Court. This Court granted stay of execution on condition that Bank guarantees were provided. In compliance with the court order, the 1st respondent obtained Bank guarantees from Barclays Bank of Kenya Limited and Kenya Commercial Bank Limited.

[29] From the record, the guarantees issued by the 2nd and 3rd respondents on 4th and 17th April, 1997 were in relation to the enforcement of the judgment obtained by the appellant ex-parte on 15th March, 1996. The guarantees were a security for the payment of the judgment debt or decretal sum in the event that Civil Appeal No. 75 of 1997 filed by the 1st respondent against the said judgment was unsuccessful.

[30] It is notable that this Court in its judgment of 15th October, 1997 in respect of Civil Appeal No. 75 of 1997 extended the duration of the guarantees issued by the 2nd and 3rd respondents until the hearing and determination of the suit in the High Court. In the said judgment this Court set aside the *ex parte* interlocutory judgment entered by the High Court on 15th March, 1996 and allowed the 1st respondent to file its defence.

[31] The Judgment of this Court of 15th October, 1997 in Civil Appeal No. 75 of 1997 therefore makes it clear that the guarantees issued by the 2nd and 3rd respondents were due and payable upon the determination of the suit in the High Court. On 16th June, 2006 the High Court in respect of Civil Suit No. 3737 of 1995 entered judgment in favour of the appellant and a Decree was drawn for Kshs.43,208,518.36.

[32] It is notable that the appellant did not call upon the 2nd and 3rd respondents to honour their guarantees upon judgment being entered in his favour or take any action to enforce the said guarantees. On 20th July, 2006, the appellant accepted a new security in the form of the Insurance Bond and sought to enforce the Insurance Bond in execution of the Decree.

[33] On 27th July, 2008 and 30th July, 2008, the appellant procured further security from **Barclays Bank of Kenya Limited** and **Kenya Commercial Bank Limited** dated 27th July, 2007 and 30th July, 2007 as separate and alternative guarantees as security for the repayment of the judgment debt or decretal amount. The appellant sought to enforce the said two guarantees by serving notices upon the two Banks to honour the said guarantees.

[34] I take cognizance of the fact that while obtaining further securities, there was no indication that the new guarantees were over and above or in addition to the guarantees issued by the 2nd and 3rd respondents. From the evidence on record, the appellant is estopped from enforcing the guarantees issued by the 2nd and 3rd respondents once he sought different forms of security pursuant to further orders of the court. This was buttressed by the appellant's failure to enforce the guarantees issued by the 2nd and 3rd respondents in compliance with the court order of

27th February, 1997 and the terms of the subject guarantees once Civil Suit No. 3737 of 1995 was dismissed and Civil Appeal No. 75 of 1997 was heard and determined.

[35] **Black's Law Dictionary Ninth Edition page 630**, defines estoppel by election as:

“The intentional exercise of a choice between inconsistent alternatives that bars the person making the choice from the benefits of the one not selected.”

In the case of **W. J. Allan and Company Ltd vs EL Nasr Export and Import Company [1972] 2 ALL ER 127**, the court stated:-

“... where one party to a contract has by his conduct induced the other to believe that he will not insist on his strict legal right under the contract, the party who has waived his right cannot afterwards insist in them if the other party has acted on that belief differently from the way in which he would otherwise have acted. It is not necessary for the other party to show that he acted to his detriment...”

The doctrine of election was enunciated in the case of *Scarf v Jardine* (supra) as follows:

*“Now on that question there are a great many cases; they are collected in the notes to *Dumpor's case* 1 Sm L C 8th edn 47, 54 and they are uniform in this respect, that where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted, it is final and cannot be altered. ‘Quod semel placuit in electionibus, amplius displicere non potest.’ ... and I do not doubt that there are many older authorities to the same effect; but that rule has been uniformly acted upon from that time at least down to the present. When once there has been an election to do one of the two things, you cannot retract it and do the other thing; the election once made is finally made.” (Emphasis added)*

[36] In **Kenya Chemical and Allied Workers' Union V Bamburi Cement Limited [2017] eKLR**, this Court stated that:

“A party who has made a conscientious election that has led the other party to believe that he intends to adopt a particular position going forward is estopped from going back on his election.”

The appellant by his conduct in pursuing the enforcement of the Insurance Bond and Bank Guarantees elected to enforce the securities issued by way of the Insurance Bond and Bank Guarantees over the ones issued by the 2nd and 3rd respondents. The appellant's right to pursue the 2nd and 3rd respondents' guarantees crystallized when the appeal against the judgment of the High Court was dismissed by this Court on 15th October, 1997.

[37] The action by the appellant in accepting the Insurance Bond and the Bank Guarantees discharged the 2nd and 3rd respondents from their obligation under the guarantees they had issued. One of the factors that can discharge a contract is novation of a contract. **Black's Law Dictionary Ninth Edition page 630**, defines novation as follows:

“The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party. A novation may substitute (1) a new obligation between the same parties, (2) a new debtor; or (3) a new creditor.”

[38] This Court in **Safmarine Kenya Limited Vs. KRK Impex PUT Limited & Another [2015] eKLR** stated as follows:-

A novation *“is an act whereby, with the consent of all parties, a new contract is substituted for an existing contract and the latter discharged. See 22 Halsbury's Laws (5th Edn) para 598.”* That text states that to have a novation,

“two things must concur: there must be the animus novandi, and the substitution of some other thing for the original obligation out of which the debt arose ... The animus novandi ... is a thing which is not to be proved as a fact, but is an inference from the facts which are proved.”

Novation can also, therefore, be implied from the conduct of the parties where it is clear that it is intended to substitute the parties to the original contract, and that the parties intended to protect the integrity of the transaction between them. That was the case here. The appellant was clearly debarred from undertaking any actions that would undermine the integrity of the transaction between himself and the 1st respondent. I find that there was novation of the guarantee issued by the 2nd and 3rd respondents by the appellant's acceptance of new securities in the form of the Insurance Bond and the Bank Guarantees.

[39] In **Paal Wilson & Company A/S vs. Partreederei Hannah Blumenthal, (The Hannah Blumenthal) [1983] 1 ALL ER 34** the House of Lords stated as follows regarding the doctrine of discharge by conduct:-

“... The first way is by showing that the conduct of each of the party, as evinced to the other party and acted on by him, leads necessarily to the interference of an implied agreement between them to abandon the contract. The second method is by showing that the conduct of B, as evinced towards A, has been such as to lead A reasonably to believe that B has abandoned the contract, even though it has not in fact been B's intention to do so, and that A has significantly altered his position in reliance on that belief...”

Accordingly, the appellant's action in seeking to enforce the Insurance Bond and the Bank Guarantee amounted to a discharge by conduct of the guarantees issued by the 2nd and 3rd respondents.

[40] The upshot of the above is that this appeal has no merit and I would dismiss it with costs to the respondents.

Dated and delivered at Nairobi this 5th day of April, 2018.

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF HANNAH OKWENGU, JA.

[1] The facts leading to the appeal now before us have been stated by my sister Judge Mohamed, JA, whose draft judgment I have had the opportunity to read. However, it is necessary for me to restate some of these facts in view of the convoluted manner in which appeal before us has arisen.

[2] The appellant James G. K. Njoroge t/a Baraka Tools Hardware was the plaintiff in HCCC NO. 3737 of 1995. Pursuant to the orders given by the High Court on 27th February, 1997, in HCCC NO. 3737 of 1995, **Bamburi Portland Cement Company Limited** and **East African Portland Company Limited** who are the 2nd and 3rd respondents in this appeal, committed themselves by each issuing a guarantee as a condition for stay of proceedings pending the hearing of an interlocutory appeal (Civil Appeal No. 75 of 1997) filed by **Kenya Cement Marketing Company Limited**, the 1st respondent herein, who was the defendant in the High Court suit. By the guarantees, the 2nd and 3rd respondents, undertook to fully satisfy the decree or award arising against the 1st respondent from the judgment in HCCC NO. 3737 of 1995.

[3] In a judgment delivered by this Court on 15th October, 1997, Civil Appeal No. 75 of 1997 was allowed and the *ex-parte* judgment against the 1st respondent set aside. The 1st respondent was granted leave to file a defence on condition that:

“the condition imposed by the Superior Court, as stated herein before, shall continue to remain in force until the hearing and the determination of the suit in the Superior Court.”

[4] The condition imposed by the High Court was the provision of guarantees by the 2nd and 3rd respondent. Therefore the order made on 15th October 1997 meant that the guarantees that had been given provided by the 2nd and 3rd respondent would remain as security until the determination of HCCC 3737 of 1995. The suit was subsequently heard by the High Court and determined in the appellant's favour on 16th June, 2006. At this stage under **section 92** as read with **section 34**, of the **Civil Procedure Act**, the appellant was entitled to enforce the guarantees issued by the 2nd and 3rd respondents. However, no attempts were made to enforce the decrees at that stage.

[5] Following another application made by the 1st respondent on 10th July, 2006, for an order of stay of execution of the High Court decree pending appeal, a conditional order of stay of execution was issued by the High Court which required a guarantee, by an Insurance Company pending the hearing of the application for stay of execution, and this guarantee was given by APA Insurance Limited on 20th July, 2006.

[6] The application for stay of execution was dismissed by the High Court on 3rd August, 2006, but the 1st respondent again filed Civil Appeal No. 118 of 2007, and obtained another order of conditional stay from this Court, pursuant to which Barclays Bank of Kenya and Kenya Commercial Bank each issued a guarantee for Kshs.21,604,259/18.

[7] The enforcement of the guarantees issued by 2nd and 3rd respondents which was at the core of the judgment of the High Court subject of the appeal before us was convoluted by two factors. First is the unsuccessful attempt that was made by the appellant to enforce the guarantees issued by the two Banks, by way of Garnishee Proceedings following the striking out of the 1st respondent's appeal. Through this misguided approach, it was evident that the appellant had elected to pursue Barclays Bank of Kenya Limited and Kenya Commercial Bank Limited for satisfaction of the decree and not the 2nd and 3rd respondents who had initially guaranteed the satisfaction of any decree issued in HCCC No. 3737 of 1995.

[8] The other factor is that the guarantees issued by the 2nd and 3rd respondent though initially a condition for stay of proceedings were in terms that indicated that the 2nd and 3rd respondents undertook to satisfy the decree against the 1st respondent in HCCC 3737 of 1995. Indeed, this Court in Civil Appeal No. 75 of 1997 required the guarantees to remain in force until HCCC 3737 of 1995 is determined. However, notwithstanding the guarantees issued by the 2nd and 3rd respondent for the satisfaction of the decree, the High Court made subsequent orders requiring other guarantees. This resulted in the guarantee issued by the APA Insurance Company, and later yet other guarantees issued by Barclays Bank of Kenya and Kenya Commercial Bank each undertaking to satisfy half the amount of the decree that had already been issued against the 1st respondent in HCCC 3737 of 1995. In effect the guarantees issued by the 2nd and 3rd respondents

were ignored and therefore discharged by these subsequent guarantees that were issued.

[9] I am in agreement with the arguments posited by Mohammed, JA. in regard to the exercise of an election by the appellant to pursue APA Insurance, Barclays Bank of Kenya Limited and Kenya Commercial Bank Limited, instead of the 2nd and 3rd respondents. In its efforts to execute the decree, following the finalization of the appeal, it is clear that the appellant opted to pursue APA Insurance Company and the Banks rather than the 2nd and 3rd respondents. The appellants could not have it both ways. Either the 2nd and 3rd respondents' guarantee was the one to be enforced or the guarantees provided by APA Insurance Company or that provided by the two Banks. By his conduct, the appellant opted to pursue APA Insurance Company and the Banks and not the 2nd and 3rd respondents.

[10] For these reasons, I find that the learned judge was right in setting aside the execution proceedings against the 2nd and 3rd respondents. I find no merit in this appeal, and would concur with my sister judge, that the appeal be dismissed. G. B. M. Kariuki JA having retired from the Bench, I make orders under **Rule 32(3)** of the **Court of Appeal Rules** that the appeal be dismissed and that there be no orders as to costs.

DATED and delivered at Nairobi this 5th day of April, 2019

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.