



**Co-operative Bank of Kenya Ltd v Chemagro Ltd (Civil Suit
548 of 2002) [2009] KEHC 1931 (KLR) (7 August 2009) (Ruling)**

CO-OPERATIVE BANK OF KENYA LTD v CHEMAGRO LTD [2009] eKLR

Neutral citation: [2009] KEHC 1931 (KLR)

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

CIVIL SUIT 548 OF 2002

MK KOOME, J

AUGUST 7, 2009

BETWEEN

CO-OPERATIVE BANK OF KENYA LTD PLAINTIFF

AND

CHEMAGRO LTD DEFENDANT

RULING

1. Before me for determination is chamber summons dated 26th May, 2009 which is brought under provisions of Section 3A of the *Civil Procedure Act*, and Order XXI Rule XXI of the Civil Procedure Rules. The defendant/applicant seeks for orders that there be a stay of execution of the decree and judgment herein; that the plaintiff/respondent do render the accounts pertaining to the case herein, and the guarantee signed on 23rd August, 2005 be declared a unlawful null and void.
2. The application is predicated on the grounds that the defendant company has collapsed, the defendant had paid money in their account which has not been credited by the plaintiff. Finally the directors of the defendant are retirees with meager means of income. Those grounds are expounded by the matters deposed to in the supporting affidavit of Henry Ogola sworn on 26th May, 2009. According to the supporting affidavit, it is stated that Henry Ogola and Mellan Apondi Ogola are the directors of the defendant. It is contended that the two directors were threatened and they signed a guarantee to pay the plaintiff the decretal sum owing by the defendant.
3. The defendant is a limited liability company collapsed, the directors who are retirees, have no means of income and are not capable of paying the sum under guarantee. They urged the court to declare the guarantee unlawful because the plaintiff was supposed to proceed for the recovery of the money owed by the defendant under the provisions of part 6 of the *Companies Act*. The directors were supposed to be examined but instead, they were threatened with the possibility of being committed to civil jail.



- That is how they signed the guarantee promising to pay the debt of the company. Counsel urged the court to find the guarantee should not be taken to cover the company's liabilities.
4. This application was vigorously opposed by the plaintiff; counsel relied on the replying affidavit sworn by Perris Mburu on 10th June, 2009. According to the plaintiff, the issues regarding the validity or otherwise of the guarantee were determined in the notice of motion dated 08th April, 2008 by the ruling of Khaminwa J dated 16th October, 2008. The issue regarding the guarantee is therefore *res judicata*. The guarantee was also adopted as an order of this court *vides* a ruling delivered on 31st October, 2007 by Azangala J. Which order has never been set aside.
 5. The defendants voluntarily signed the guarantee in which the directors guaranteed to pay the sum owing to the plaintiff. Although the defendants claim that they have not been furnished with the statements, they have neglected to pay the accounts. The statement of account is annexed to the replying affidavit and it is evident that the last time the defendants made any payments on the account was on 30th November, 2004. This application is meant to forestall execution proceedings. No sufficient cause has been shown why there should be a stay of execution. This court should not be used to grant the defendant perpetual amnesty and facilitate it from escaping from the indebtedness.
 6. Having set out the summary of the gist of the matters contained in this application, it is clear from the ruling by Khaminwa J delivered on 16th October 2008, the issue of the validity of the guarantee that was signed by the directors was determined. The defendants sought a specific prayer that the guarantee will be declared a nullity due to failure of consideration. Bringing this application that is seeking for the same order is prohibited under Section 7 of the *Civil Procedure Act* under the principle of *res judicata*.
 7. The other substantive prayer sought in this application is for the accounts. The replying affidavit contains the statement of accounts payable by the guarantors therefore nothing turns on this prayer. I find no justifiable reason why the defendant should be given stay of execution merely to escape from its duties of paying the decretal sum.
 8. The court determined that the guarantee was validly executed by the directors of the defendant. That guarantee was made an order of this court; it has not been set aside. The statement of accounts show the last payment made by the defendants towards the decretal sum was some Kshs.10, 000/= which was paid on 30th November, 2004. The defendants have not shown any sufficient cause to warrant the granting of an order of stay of execution, this application is dismissed for lacking in merit with costs to the respondent.

RULING READ AND SIGNED AT NAIROBI THIS 7TH AUGUST, 2009.

M. K. KOOME

JUDGE

