



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

**Civil Case 548 of 2002**

**CO-OPERATIVE BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**CHEMAGRO LTD.....DEFENDANT**

**RULING**

Application dated 08.04.2008 by notice of motion seeking orders that guarantee signed by Applicants dated 23.08.2005 be discharged and in the alternative the applicants Henry Ogola be discharged from liability under the said guarantee.

The grounds upon which the application is made and set out namely:

1. That the plaintiff has breached the expressed terms of the said guarantee. This rendered it unenforceable.
2. The said guarantee is discharged due to failure of consideration.
3. The plaintiff has taken steps to execute decree against the defendant against terms of guarantee.

The application is supported by affidavit of Henry Ogola, Director of defendant Company who with his wife Merab Apondi Ogola signed guarantee dated 23.08.2005 which is annexure "H02".

The guarantee in favour of the plaintiff decree-holder was issued in consideration of decree-holder having at the request of guarantors agreed to forbear the execution of judgment entered against defendant Chemagro Ltd – Judgment Debtor and having agreed to accept payment of decretal amount due together with further interest and loss from the Judgment Debtor by monthly installments of Kshs. 10,000/= each commencing 30.06..2005. This is adequate consideration.

The guarantors who were joint Directors of Defendant Company guaranteed the payment to Decree-holder of the said decretal amount outstanding in the whole case.

Provided that in the event of the Judgment Debtor's refusal, failure, or neglect to pay any one installment on the due date the entire decretal amount then due shall become immediately payable by the guarantors. The Decree-holder shall be at liberty to treat, consider and regard the guarantors as the principal debtors to all intents and purposes.

From the record and the applicant's evidence in the affidavit, the confusion is created by the fact that

the guarantors are the joint directors of judgment debtor – the defendant. They are unable to separate their interest with those of Defendant.

The method of execution of decree by examining the directors of company is provided Civil Procedure O.21 Rule 36.

In this case leave to examine directors was granted on 02.06.2005. The date for the examination was on 25.08.2005 but the matter was not listed. The guarantee was signed on 23.08.2005 after negotiations on guarantee terms in the period between 08.08.2005 and 23.08.05 as per letters exhibited.

The Judgment Debtor did not pay as agreed and on 06.02.2006, a demand letter was written to the two guarantors demanding payment in the sum of Kshs.5,225,322/= the decretal amount then due.

The guarantors had become liable because of default of the defendant and it was necessary to take action against the guarantors and the judgment debtor as principal debtor under the guarantee. The guarantors (the two directors) were hereby treated as principal debtors as well.

Therefore there was no breach by the judgment creditor but the breach was on the part of Judgment Debtor and their guarantors.

I therefore find no merit in this application. The Respondent is entitled to execute against both guarantors and Judgment Debtor to recover full amount due.

Application is dismissed with costs.

Orders Accordingly.

**DATED** this 16<sup>th</sup> day of October 2008.

**JOYCE N. KHAMINWA**

**JUDGE**